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STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION

WEDNESDAY, DECEMBER 2, 1987



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Decker, Todd

Staff:

Evans, Catherine, Research Officer, Legislative Research Service

Witness:

From the Office of the Ombudsman:

Meslin, Eleanor, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, December 2, 1987

The committee met at 10:10 a.m. in committee room 1.

ORGANIZATION

Clerk of the Committee: Members of the committee, it is my duty to call upon you to elect a chairman. Are there any nominations?

Mr. MacDonald: I nominate Cindy Nicholas.

Clerk of the Committee: Are there any further nominations? If none, I declare nominations closed and Miss Nicholas elected chairman of the committee.

Madam Chairman: May I have nominations for the election of a vice-chairman?

Mr. Carrothers: I would like to nominate Walt Elliot.

Madam Chairman: Are there any other nominations? If there are none, Walter Elliot will stand as vice-chairman. At this point, we should have a motion regarding the transcription.

Mr. Charlton moves that, unless otherwise ordered, a transcript of all committee hearings be made. Carried.

We should set up a subcommittee to respond to communications from the public. The terms of reference for the subcommittee are on the second page of the agenda.

Mr. McLean: It is my understanding that usually one member from each party is represented on that subcommittee.

Madam Chairman: That is correct.

Mr. McLean: I will represent our party.

Mr. Charlton: I would like to place the name of Ed Philip.

Madam Chairman: I understand it is traditional that the chairman be on this committee as well, if that is acceptable.

Mr. Elliot moves that the terms of reference for the subcommittee on communications from the public be adopted. Carried.

Next on the agenda, we have put in a discussion we would like regarding the legal counsel whom we have for the standing committee on the Ombudsman. Those who have been on this committee before--I do not know if any are present--Mr. McLean, you have--may enlighten us a little bit on this.

It is my understanding that Mr. Bell has been with this committee for almost 10 years and has served as legal counsel for the committee. He has in fact attended virtually all the meetings and has participated very actively in the committee.

At this point, I would like to open for discussion, but not a decision to be made today, whether we should continue to have him on as a full-time legal counsel. The reason I bring this up is, as I understand it, in the past this payment for, or agreement by, the Board of Internal Economy to pay Mr. Bell has always had to pass with the Board of Internal Economy, because it is unique to have a legal counsel advising us on a regular basis.

What I would like to open for discussion now is perhaps a couple of alternatives. One is to keep Mr. Bell on as legal counsel always, as he has done in the past. The second is rather than do it permanently, use him on an as-needed basis if we have any special investigations or one or two particular aspects of the committee discussion. This may provide us with a little bit more responsibility, but may also make it a little bit easier through the Board of Internal Economy. His payment may stay the same, but he may only be used when we really need him to be used. I propose that we invite Mr. Bell next week to speak to us on this matter. I gather from discussions with him that he would not necessarily be put out by such a motion. Certainly, this committee has used his advice many times.

I would appreciate, at this point, Mr. McLean discussing what he sees as the importance of Mr. Bell's role as legal counsel.

Mr. McLean: I guess really the problem that we have is to get approval through the Board of Internal Economy for his pay. His pay was established on an hourly rate. I think it is important in this committee--and this is the only committee that has a legal counsel--that we continue to do that, because this committee, I have always found, has been a nonpartisan committee that deals with the lives and the futures of people of this province. I think it is important that we retain him as our legal counsel, given the background and experience he has had.

Mr. Charlton: Can you address the question of full-time versus an as-needed basis?

Mr. McLean: Yes. I feel we would get more value for our money on a full-time than on an as-needed basis, because if we were to call him and just use him on a certain fee basis or need basis, then his fee would be substantially higher per hour or whatever the case he would be dealing with; whereas on a full-time basis, it is less. I feel we got our money's worth. I believe a full-time basis would be right for this committee.

Madam Chairman: It is my understanding that Mr. Bell has currently been paid \$85 an hour to a maximum of \$20,000 per year and he has used the maximum each and every year. There is no real discussion about how valuable he has been to the committee in terms of the time and effort he has put in for that \$20,000. It actually has been quite onerous on him in terms of the \$85 an hour, as we all know what lawyers charge, and he has been very valuable. But it is a question of whether his efforts could be more concentrated into certain aspects of the Ombudsman's committee because, as Mr. McLean pointed out, it is unusual to have full-time legal counsel.

We do have a couple of lawyers in the room today, and I have just been informed that Mr. Bell has a court appointment next Wednesday at this time. If the committee would allow me to, I would like to welcome him in to perhaps discuss this with us unless you are prepared to make a decision today. He has to come between 9 a.m. and 10 a.m.

1020

Mr. Charlton: Two things arise out of what you have just said. First, if he has used the maximum each year for the last several years--I do not know how many--it would seem to indicate that he has probably put in more hours than what he has been paid for at the rate of \$85 an hour and that may be something that indicates a reason for some serious further discussion of this. In the context of what Mr. McLean said about putting him on a straight fee basis, we may end spending as much money and getting a lot less from him.

We have one other former member of the committee who is still a member and that is Ed Philip. Hopefully, he will be at our next meeting.

Mr. McLean: Mr. Bossy too.

Mr. Charlton: I think it might be useful if at our next meeting we also invited other former members of the committee for their comment just in terms of how necessary they feel he was or is to help those of us who unfortunately have not been members of this committee on an ongoing basis.

Madam Chairman: I do not think there is any question that he is a valuable component to the committee and I would hate for anybody to think that I think otherwise. He was very valuable and I think conducted a lot of investigations and did a lot of preparation before the committee met. I do not think anyone will disagree with that.

The problem we do see with it is with the Board of Internal Economy reviewing the budget and seeing that once again we have applied for full-time counsel. Secondly, he could perhaps be used on an as-needed basis, which might still be at \$85 an hour and it might still entail the \$20,000 maximum.

Perhaps Eleanor Meslin could tell us what her views are on it. Eleanor is here on behalf of the Ombudsman, and we have asked her here today to outline some of the agenda items that the Ombudsman would like us to review; but she would have some experience with regard to the legal counsel.

Mrs. Meslin: I do not want to comment about part-time or full-time. I would only like to comment about my experience with what happens in terms of the recommendation-denied cases, which are the bulk of the work of this committee.

What John Bell has had to do, generally, is read and become acquainted with each particular case before the committee even sees it. He usually communicates with the various ministries before the committee meets with the ministries in an effort to see whether some additional negotiation is possible or some clarification for this committee. He then meets with the committee to brief them on it before anything else happens. When the proceedings occur, that is when the Ombudsman and the particular ministry in question come to present their cases to this committee, he generally handles the preliminary questioning.

I think what the committee has to be aware of is that by the time you get a case to look at it is usually one either of extreme legal complexity or of large political ramifications. In most cases, the detail is often very full and a lot of direction is needed. He does that, so that it is difficult to see a part-time process unless you just bracket it.

The other area that he has been involved in is that when you go through our annual report in terms of the statistics that we bring to you, the report on the kind of work we do, because of his knowledge of the kinds of cases that we handle and the process in particular, he often again assists the committee by raising some of the issues. He does a lot of the preliminary work before, raises those issues and then brings them to the committee and questions the committee. In a nutshell, those are the areas he is most prominently involved in.

At the committee hearings, when we have a particular issue, because of his historic experience in this organization, I think he has been useful, particularly to new members. We run quite differently, or have, to any other committee because of the case load this committee ends up having to carry. Often what happens is that in the midst of something that was completely unplanned, a particular issue comes up that deals with a past case, and without him you may have to postpone.

I think that is as much as I can offer.

Mr. Charlton: As somebody who has some considerable experience in dealing with the Board of Internal Economy, I would like to pass these comments along to you and to the committee.

It seems to me the committee is set up to deal with particular matters, and I think it is up to this committee to decide how best this committee can deal with those matters. We should not be making a decision based on whether or not we think we are going to have a problem with the Board of Internal Economy. If that occurs, then I think we can deal with that problem when it occurs.

We had a problem last year, for example, in the standing committee on regulations and private bills around the question of staff. It was not legal counsel in that case, but the committee finally had its way. I think we have to be making our decision based on a thorough discussion of what this committee has to do and how we see we are best able to do that job. Then if we run into problems with the board, we will deal with them.

Mr. Bossy: Just a short comment, having served on the committee for two years. I do not know how, as new members, we would have functioned without the help of, say, in this case, Mr. Bell, because we did not know what to expect. We need legal expertise to brief us prior to the meetings. I agree that he was very, very valuable to the committee because we had some fairly heavy material that came before us last year. I would say he is a key person to be serving this committee.

Forgive me for missing the earlier part of the comments; I have to base it on the fact that there is some suggestion that we only hire on a part-time basis. Is that correct?

Mr. Lupusella: That is one of the alternatives.

Mr. Bossy: Oh. Maybe we should have a review and see exactly how many hours the committee sat last year. It would be interesting to know how much time we consumed. That would give an indication too as to the necessity. But we should have legal counsel by all means, and I say by all means. Most of us are not lawyers. We may have a little bit of what they call a paralegal mind, but at the same time, legal counsel to this committee is extremely important. I would say we should look at full-time.

Mr. McLean: One of the reasons it has been on a full-time basis is the fact that, as Mrs. Meslin has indicated, there are different types of cases that come. The Ombudsman's office would then notify our solicitor and he would start working between himself and the ministries to get the background. Then when our committee meets, he can brief us on that particular case or any other case.

If you have a legal counsel on call, then when a case comes in he is going to say, "OK, have you appointed your legal counsel yet?" or, "Has the committee instructed which legal counsel you want to deal with that case?" I think why this committee has worked so well is because we have had a legal counsel appointed and the work has been done for us. A lot of the background has been done for us. I think it is important that we retain the same man that we have.

1030

Mr. Elliot: I see a real danger in taking someone of this degree of importance on a part-time basis, because the implication to me is if you are part-time, you are not on call until you are called. We may very well get to a point where we need his expertise very badly and he might not be available. The amount of money we are talking about in total here is part-time. It is just full-time in that he is available to this committee full-time. I think we need him on a retainer basis, which is the way I am looking at this. I suspect, as Brian pointed out already, if he has gone to the maximum every year in the immediate past, we are probably getting great value for our money and I do not think we should be concerned at all about the Board of Internal Economy on this. We need somebody we can count on.

I feel a little naked at the suggestion that we would not have that kind of continuity, to tell the truth.

Madam Chairman: I have been informed that Mr. Bell would probably prepare about five hours for a committee meeting in terms of his billing. I do not think there was any suggestion on the table that we not continue with Mr. Bell. There has been no indication that anybody has been anything but very pleased with his performance and with the amount of advice and assistance that he has given to the committee. It was rather just that we could outline a few areas in which his expertise might be of particular importance, rather than on an ongoing, weekly basis helping the committee.

No conclusion has been met, but there is a general consensus I think around the room that he could be very helpful on a full-time basis. On that basis, I would like to invite him next week and also move the time of our meeting to 9 a.m. on Wednesday, December 9, so that we can hear from Mr. Bell and perhaps any suggestions that he might have in this regard.

Mr. Charlton: We cannot force other former members to be here just for the comments next week. I would suggest the chair invite other former members of this committee to make some comments to help the new members in their decision next week.

Madam Chairman: Would anybody be opposed to that?

Mr. Carrothers: Just one question. Is the discussion on the legal counsel relating to what might be perceived as a difficulty going through the Board of Internal Economy? Mr. Bell himself has not been bringing up that fee, has he? It is a startlingly low fee in my view, \$85 an hour. I am wondering if he has expressed any dissatisfaction or indicated that he might not be able to continue operating at that fee level.

Madam Chairman: The clerk, Todd Decker, can comment on this.

Clerk of the Committee: In the very recent past, Mr. Bell did bring up the matter of his fee, not in terms of the \$20,000 cap, but he felt it would be easier to justify his service to the committee to his partners in the firm, Shibley Righton and McCutcheon, if he were able to show for accounting purposes that he was billing \$100 per hour. The committee agreed with that. It went to the Board of Internal Economy and was refused. They reiterated that \$85 was the maximum payable for a counsel to legislative committees and the matter stopped there. John Bell was happy to live with that but wanted \$100 an hour, while maintaining the \$20,000 cap.

Mr. Charlton: It did not make any difference as to how much he earned?

Madam Chairman: No, it did not. One reason for bringing this up was the Board of Internal Economy. The second reason was that it is unique for the committee on the Ombudsman to have a full-time legal counsel. I am just bringing it up for discussion in that perhaps the legal counsel has been taking on some of the duties which we should be taking on, first of all. Secondly, we do have legal research available, through Catherine Evans who is here today. She can undergo a lot of research that perhaps Mr. Bell may have been undertaking, although she cannot make presentations to the committee as Mr. Bell did.

There would be a lot more onus on the committee members if Mr. Bell was not here on a full-time basis.

Mr. Charlton: Just on this matter which Todd raised about the \$85 an hour, which is the rate that committees are allowed to pay either legal counsel or consultants, you are right. The Ombudsman's committee is the only committee which in the past has retained a full-time counsel or a counsel who is available to the committee on a full-time basis. Other committees do hire legal counsel and consultants and the issue of the \$85 rate is an issue, by itself, which will be going before the board again this year, aside from what we decide on the question of full-time or part-time.

Mr. Carrothers: If he went part-time, would it then not be falling to the legal members of the committee to pick up where he had left off? From what I heard, there was a bit of a previous negotiating or finding out what sentiments or what other matters the two parties might agree on and briefing the committee on that. I am wondering how that would be done if he was not there to do it.

Madam Chairman: My understanding is that he was undertaking a lot of the interview process with either the complainants or with the various parties and came here prepared. He had done the research and presented a prepared package per se to the committee in a form that was complete. This would put more demand on us to do some of the investigation or to do it if he, on an as-needed basis, was solely to do that part of the work in the preparation.

Mr. Carrothers: Did he not do the questioning of the parties before the committee as well? I just wondered if he was leading the questioning of the parties before the committee?

Madam Chairman: Most definitely.

Mr. Carrothers: He essentially led the case and presented the case to the committee. Without someone like that, the committee would have to be doing it.

Madam Chairman: That is right. He led all the cases and there was very little participation by the members during investigation.

Mr. Carrothers: Or arbitrating them.

Madam Chairman: That is correct.

Mr. Bossy: We always have to remember this is still a political forum too. We want to try to be united in making decisions, but there are the political aspects we have to deal with. I do not know whether we have any legal people on this committee, but in the past, I did experience the feeling that whenever there was a legal person on the committee, that person seemed to dominate in the committee.

Mr. McLean: Not always necessarily being right.

Mr. Bossy: You are dead on. Then it becomes that other members seem to back off because we are dealing mainly with an awful lot of legal matters. We know what transpires behind the scenes. Because people are not satisfied, they go to the Ombudsman, which is the only legal process they have to fight the government; then it becomes a decision-making body here that surely needs legal advice as to how to respond to that.

Madam Chairman: Mr. Elliot, do you wish to have a comment?

Mr. Elliot: I do, but I think Mrs. Meslin had something to say with respect to what Doug said, so I will let her go first.

Mrs. Meslin: I only wanted to make some clarifications for the chair. When you outlined what John Bell did, the committee, whether you have lawyers on it or not, could not be seen to be negotiating, interviewing or investigating prior to any kind of hearing of a case.

You people are the final arbiters of the Ombudsman and the ministry coming before you with their positions. You could not possibly be seen to go behind the committee to do prior inquiries or attempts at negotiation.

Mr. Elliot: The comment I would like to make is relative to the fee. As a rookie here, I wonder if it is appropriate for us as a committee to make a strong recommendation to the Board of Internal Economy that that fee be increased to \$100, based on past experience, so that Bell's name is not linked with the fight this particular year. I feel, as Doug feels, very strongly that it is very low. If that is what they are paying consultants in all of the committees, I think we as a committee should react as strongly as we can in order to rectify the situation. If it is in order, I would be prepared to move that we make a strong recommendation to the Board of Internal Economy that the fee for legal counsel and/or consultants be increased from \$85 to \$100.

1040

Mr. Carrothers: I will second that.

Mr. Charlton: Just on that point, I would certainly support the motion for a number of reasons. One reason, as I have suggested, is that it has been a problem in the past for other committees, as well as for this committee. Although it may be some time before other committees are sending similar motions to the Board of Internal Economy, I can assure you that other committees will.

The select committee on energy, both in 1985 and in 1986, sent similar motions to the Board of Internal Economy, because the select committee was doing specific investigations and attempting to hire--in one case, legal counsel, and in the other case, a consultant--and ran into almost the identical problem in terms of the hourly rate. I would assume, for example, that when the select committee on energy is reconstituted--whether that will be in this coming break or later in 1988, I am not sure yet--you will see similar motions going from other committees that are saddled with specific work that has legal implications. So the more committees that pass those kinds of motions and make those kinds of recommendations to the board, the more likely we are to see some realistic changes.

Madam Chairman: Shall I then put a suggestion to the meeting that we invite Mr. Bell next week at 9 a.m. and also members of the committee who are willing to attend who were part of the committee last year for a discussion with Mr. Bell what he feels his major role should be. My understanding is there are three aspects that we should deal with. One is reviewing the annual report of the Ombudsman, the second is reviewing the denied cases and the third is writing out the committee report. Perhaps he feels that one of those--or any of those functions--are ones that could be given to somebody else whom we have at our disposal. Is it acceptable that we discuss that with him next week?

Mr. Lupusella: I have a question. What is the sense of inviting other members, members who used to sit in the same committee, when all the case law which is before this committee is completely different from discussions which took place in the past? I do not understand why you have to use this procedure to invite other people, unless we are going to talk about legal counsel.

Mr. McLean: I think if Ed Philip was here he would pretty well explain to you the situation and I am sure he will feel the same way as I and many others do.

Mr. Charlton: The purpose of my proposal was that, simply put, we have a number of new members on this committee who are unfamiliar with the full extent of the kinds of things we would be asked to deal with. I think all of us have some idea, but I think it would just be useful to have the advice especially of those who are not of the legal community, who have sat on this committee before, in terms of the extent to which they felt they had to rely on the legal work that Mr. Bell did for this committee.

Madam Chairman: Mr. Lupusella, are you opposed to inviting the committee--

Mr. Lupusella: I am still not satisfied about this proceeding. There is a general consensus about this committee and the relation to hiring our counsel on a permanent basis, but I still do not understand why other members sitting on this committee are supposed to appear before the committee to explain to us the process which is before us. It is a completely new game. We have a case law before us that is completely different from the past and this case law must be scrutinized by the members of this committee. I still do not understand what I have to learn from other members who previously used to sit on this committee.

Madam Chairman: Mr. Charlton, is it acceptable to you that if Mr. Philip can come, at least we would have one person from each party who had sat on this committee before? Would that be acceptable?

Mr. Charlton: Sure.

Madam Chairman: Is that acceptable to everybody else? Are there any strong feelings?

Mr. McLean: Are we having Mr. Bell?

Madam Chairman: Mr. Bell will come next week, but we have to convene the meeting at nine o'clock in the morning.

Mr. McLean: For what purpose is he coming?

Madam Chairman: To discuss his role in the committee and answer any questions that any of us might have as we start into our deliberations; and, further, to review where he sees our committee going this year in addition to what the Ombudsman feels.

Mr. Bossy: I feel a little bit uncomfortable with that, because we are really asking Mr. Bell to prove his worth to the committee. I wonder if we are being fair to Mr. Bell to put him in that kind of position. The role, I am sure he can explain properly, but it is the committee that has to decide whether we feel comfortable enough that we can deal with the issues that come before us without legal counsel. Then the role that he plays is what the committee will expect of him. It will be the committee then looking.

We heard about the briefings that take place privately with the committee. I do not think he has to justify his being here. I can picture Mr. Bell sitting here as we ask him, "Now we would like to have you justify that this committee needs you." That is what we are telling him. I think we have internally to feel we need him more than he needs us.

Mr. McLean: I do not think that is the point the chairman is trying to make. The point is for him to come and tell the committee what we have done, what our role is, what we probably will be looking at doing down the road and how we operate. I do not think it is the point of his coming to indicate to us his worth. I think it is the fact of his coming to indicate to us how the committee operates, how we should proceed and what we should be looking at.

Madam Chairman: And also to he provide us with the direction and the role he would like to see himself in.

Mr. Elliot: Do we assume that the motion that I put respecting the increase in fee was passed?

Madam Chairman: Do you have it on the table? Does everybody agree that the motion was that we put before the Board of Internal Economy that the lawyers' fees, legal counsel to committees, be at \$100 per hour.

Mr. Elliot: Legal counsel and/or consultants.

Madam Chairman: Legal counsel and/or consultants.

Mr. Lupusella: I would like to speak on the motion. I am not particularly sure that the committee has to send this motion before the Board of Internal Economy. I think that is a political process. It involves the House leaders of each party bringing this concern before the Board of Internal Economy. I recommend that each party take its own responsibility to bring this issue before that political process.

If this is not established by committees but by the Board of Internal Economy, I think that is an issue which should be resolved among House leaders and the government.

Mr. Charlton: The history of decisions at the Board of Internal Economy, and amongst the House leaders prior to going to the Board of Internal Economy, is that if nobody expresses a problem, they do nothing. The reality is that it is the responsibility of each committee to put to the board those things that it feels are necessary in order for the committee to do the work which it has been instructed by the House to do. It is not the responsibility of committees to ignore the job they are directed by the House to do and, therefore, to ignore issues which impinge or impede that job.

It is the responsibility of each committee to decide what it has been instructed to do and how it is best able to do it. It is not particularly useful to avoid issues that end up impeding the committees' ability to do what they have been instructed to do. Most of the committees of this Legislature which over the course of the last three or four years have been saddled with either trying to consider consultants or legal counsel have found themselves in difficulty in terms of trying to get the level of service they require at the \$85 rate. A number of committees of this Legislature have spoken out in that fashion. I do not think it is appropriate for committees to avoid issues like that because somehow the House leaders will resolve this somewhere down the road.

1050

Mr. Bossy: Concerning the motion of \$100, I did not hear within that motion whether there was a cap.

Mr. Charlton: This motion is not a question of the cap that this committee might set on its own budget. The motion was strictly a general motion regarding legal counsel and/or consultants to committee. The cap of \$85 an hour is a universal cap on all committees presently.

Madam Chairman: My understanding is that the Board of Internal Economy will not consider any course of action not put in writing. Unless we make this motion, this committee's suggestion with regard to legal counsel in general or consultants will not be put before the board. We have the motion on the table. Could we have a vote on it? All those in favour? Against?

Motion carried

Madam Chairman: We have invited today Eleanor Meslin to make a short presentation to us, on behalf of the Ombudsman, on some of the matters that she feels we are going to have to review in this committee. I would like to give her the chair for the moment.

Mrs. Meslin: What I would like to make the committee aware of particularly are the recommendation-denied cases that may come before the committee and I would like to make some requests in terms of the committee's planning for time. Generally, the committee meets right after Labour Day to handle all of these recommendation-denied cases; so we are now holding cases that have been delayed quite a while. We also have previous cases.

In terms of the recommendation-denied cases, at this point there is a possibility of 11 cases that could come before this committee. We are hopeful that of the 11, we will be able to settle and get rid of eight.

The reason I hedge it in that manner is that, as it stands, the 11 are set to come before the committee. We are in negotiation. We are awaiting your instruction regarding our counsel to see whether we can use the process that we generally use, which is to give him the documents and the synopses and have him use the offices of this committee to see if he can also help in cutting that number down.

Generally, depending on the difficulty, you more often than not need at least a half-day for each case. The more complex ones can take a couple of days, two or three days. The Argosy case that we handled last term, which was a very large case, of course, took over a week to be brought to the committee.

In addition to those recommendation-denied cases that are waiting at this time, we have two previous cases in which the committee had made decisions and either the ministry has not done what the committee has asked it to do or the ministry said it would come back with some information. So there are two other previous cases that have to come in that package, and there is a possibility of three more special report cases.

Special reports, generally, are recommendation-denied cases that did not get into the annual report because they were completed after publication. If the Ombudsman feels they are important enough not to wait another year to come before this committee, he special-reports them and brings them before the committee. Because of the delay, you may well have three additional cases in terms of what this committee will have to look at. My best estimate of what you will be hearing and sitting to hear is that you will have three current recommendation-denied cases, two previous cases and possibly two special reports.

My estimate of the time you would need to handle those is certainly a full week at least. Our process in the past has been that recommendation-denied cases are handled in an ongoing fashion; they are not handled week to week, even though the standing committee sits only on Wednesday mornings, when we do recommendation-denied cases. Because of the difficulty of the continuity for members, we have always handled them in a span of time that goes day after day. So we would ask the committee to consider a week's time--that is, morning and afternoon--for the recommendation-denied cases.

The other issue that this committee has to look at is the other details that are in the annual report. The committee generally questions us on aspects

of the annual report, including statistics and the functioning of the organization. That, most often, takes a half a day. You will also be expected to discuss our 1987-88 estimates, which can hopefully be done in a half a day, unless there are particular problems. Then it might be longer than that.

As for the last thing we would like to raise, procedurally, I am not sure how you want to handle this. In the last session, the Ombudsman was asked by the committee to present a report to it on consideration of possible expanded jurisdiction. He prepared that report and tabled it with the previous committee. He has asked that this committee now take that report and give him some direction about whether it committee will discuss that report.

The last committee had some problems about how it was going to deal with it, whether it was going to have public hearings for people to come in to tell the committee whether jurisdiction should be expanded in the areas that the Ombudsman is suggesting. The committee was not sure whether it was going to have public hearings, whether it was going to decide in committee, whether it was going to have a number of meetings to discuss the various aspects and ask the various ministries on which it touches whether it should decide. That is another issue that the Ombudsman has asked me to put in your hands. I think that is it.

Madam Chairman: Todd, do you have a copy on expanded jurisdiction that is up to date and that you have referred to?

Clerk of the Committee: Presuming that the Ombudsman has tabled the identical report he tabled with the committee last time, I can have copies in the members' hands by the end of today.

Madam Chairman: Great. Then perhaps we can review that and give some consideration to what we think would be the best form to review the expanded jurisdiction question. A number of alternatives have been presented. We will discuss that at next week's meeting. Thank you very much for that summary.

We have in front of us volume 1, which is the annual report of the Ombudsman and which raises some questions, and volume 2, which summarizes the cases in which the recommendation has been denied. Mrs. Meslin, would it be appropriate at this time to highlight the cases where the recommendation has been denied and is still outstanding, or do you think we should wait for a later time?

1100

Mrs. Meslin: I can indicate very quickly to you from the table of contents in the front of volume 2 the matching cases that I have referred to. The recommendation denied that would come before you would be--this is page 1 and table of contents number 1--numbers 1, 7, 8, 9, 10 and 11. As you will note, they are all Ministry of Education cases and they would come to you as one matter because they all involve the same issue. If they come, we are hoping to settle them. We also have numbers 12, 14, 19, 20 and 21.

Madam Chairman: If I can recap, there are numbers 1, 12, 14, 19, 20--

Mrs. Meslin: No, you missed some.

Madam Chairman: Fine. Okay. Summarizing, numbers 1, 12, 14, 19, 20 and 21 are independent issues on which the recommendation has still been denied. As for numbers 7 and 8 there is a possibility that those will be--

Mrs. Meslin: Numbers 7 through 11.

Madam Chairman: Numbers 7 through 11, sorry. Those are the cases that are one issue and there is the possibility of settlement for those.

As you will notice on the agenda, there is no reference to having a budget. I suggest that we prepare a budget for next Wednesday with a guideline of the time that would be required--one week to review the recommendation-denied cases, and approximately one day in total to review the annual report and the estimates. It also is suggested that we leave one week open to review the expanded jurisdiction question. Is that appropriate? No comments? This is with the understanding that we hire Mr. Bell as counsel and have that in the budget as well. We will review that next week, if that is acceptable.

The last item to discuss, unless something else comes up, is that this meeting was originally scheduled to be held in the Amethyst Room, which is the room with the cameras, room 151. There is a conflict in that the standing committee on regulations and private bills has also requested to have the camera room.

I suggest that perhaps the clerk and I meet with the chairman and the clerk of that committee and discuss what arrangements can be made for us to be in the Amethyst Room, unless anybody has a suggestion regarding not being in the camera room at all, or whether we would want to be in the camera room at all times. Is there any discussion here with regard to what the feelings are about being in the room with cameras?

Mr. Charlton: I do not have any firm feelings about being in the Amethyst Room all of the time. I suggest to the chair that, from the public perspective, we as a committee should make every effort to be in the Amethyst Room when we hear the actual cases. The review of estimates and those kinds of things I see as less important in terms of the public view. A public understanding of how the Ombudsman's office works, what happens to cases after the Ombudsman has made recommendations and so on are important aspects of what goes on here. There are some fairly major misunderstandings out there in the public about the role of the Ombudsman, and probably about this committee as well, if in fact many people even know this committee exists. I think we should make every effort to be in the Amethyst Room whenever we hear cases.

Madam Chairman: Are there any other comments? Is it acceptable that I just sit with the chairman and the clerks of the two committees to come up with some agreement, keeping in mind that when we review cases, it would most probably be best if that were done in a room with cameras so that it could be viewed by the public? Acceptable?

Agreed to.

Madam Chairman: I do not think there is anything else on the agenda.
Mr. Elliot.

Mr. Elliot: I would like to ask the people who have some experience on the committee about the suggestion that we meet for a full week. My concern is that there are people waiting to have decisions heard. From past experience, is this usually done immediately, at the downtime of the House, or in what sort of time frame do you see these days coming?

Madam Chairman: May I ask the clerk to respond to this? He has been with the committee for some time.

Clerk of the Committee: What will happen is after the House has adjourned, there will be an indication of how much time will be available between the adjournment of the House and the resumption of the House. The House leaders will then consider requests from committees on the amount of time that all the committees feel they need to consider the matters before them and they will allocate blocks of weeks for each and every committee to consider those matters. Once the committee has been allocated those times, it is up to the committee to determine which days of the week it will sit, what times, that sort of thing.

At the present moment, while the House is sitting, this committee has authority to meet only on Wednesday mornings. In the normal course of events, we would wait until the adjournment and put in our request for a block of time. Once we have that allocated to us, we can determine when we will sit, what times during that week, and we can then have the continuity from day to day that Mrs. Meslin spoke of.

Mr. Elliot: So we are looking at approximately 11 days in the downtime of the House for the committee sittings, maybe more.

Clerk of the Committee: It is not uncommon, when the committee meets, for the committee to agree to meet on Tuesdays, Wednesdays and Thursdays, allowing a day on either end of the week for travel to and from your ridings. Arranging it that way, basically you are looking at--from the way the committee has operated in the past--three days of meeting time a week, morning and afternoon. Based on that, you would want somewhere between three and four weeks of meeting time. Then it is in the House leaders' hands to agree whether to give it to us or not.

Mr. Bossy: For those who may not know, that is a time when the individual members get paid extra. You earn that little bonus. So for the days that you serve, you will get paid an honorarium.

Mr. Elliot: We should make a motion to the Internal Board of Economy concerning the stipend for day--

Madam Chairman: We can suggest that if the Legislature is not sitting in January, perhaps we can get on as early as possible to deal with these cases. I think also it will give some time for Mr. Bell to prepare the cases for presentation and discussion by the committee in January. Is that acceptable?

Mr. Lupusella: The other point that should be considered is some extra time. We do not have the authority to sit above the time allocated by parliament. I am just wondering if you can make an appeal to the House leaders that the committee is going to have the authority to sit extra time if it is necessary.

Madam Chairman: We can request that for the next few weeks, but specifically for the recommendation-denied cases, Mr. Bell's stipend cannot be approved until December 14, which is when the Board of Internal Economy sits. Therefore, he really will not have an opportunity before then to review the cases for presentation.

Mr. Lupusella: Just relating to my point when the House is in recess, the government allocates a certain amount of hours to sit or a number of days to sit. Sometimes we are encountering the situation that we need extra time, so we should get the authority to sit if it is necessary. I was not making any particular reference when the House is sitting.

Madam Chairman: I misunderstood that. I think we should make that request, if it is acceptable, for more time.

We will adjourn the meeting until next Wednesday at 9 a.m. I would assume it is going to be in this room, but you will have notice of that.

The committee adjourned at 11:10 a.m.

XC 99

-053

STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION

WEDNESDAY, DECEMBER 9, 1987



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Decker, Todd

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witness:

From the Office of the Ombudsman:
Meslin, Eleanor, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, December 9, 1987

The committee met at 9:13 a.m. in committee room 1.

ORGANIZATION

Madam Chairman: All these bright and bushy-tailed eyes this early in the morning.

Mr. McLean: Best part of the day.

Mr. Philip: That takes care of the description of staff by both members.

Madam Chairman: As we discussed last week, we invited Mr. Bell to come in and give us some idea of how he sees his role on the Ombudsman and where we should go on from here in terms of what should be reviewed by the committee. Because his time is constrained, I would like him to take over now and speak to us on that.

Mr. Bell: Thank you very much. It is nice to see some familiar faces and equally as nice to see some new faces.

If you will permit me a little history lesson relating to this committee--and if you have had briefing papers from staff which duplicate this, please forgive me--I think to understand and appreciate the role of legal counsel on this committee you have to get back to the genesis of this committee and then understand how it has evolved, and I use that word in a very deliberate sense.

The committee was created in 1976 during the middle of a political turmoil called the North Pickering turmoil. The committee was struck as a select committee to afford a means of resolving the dispute that existed between the first Ombudsman, Arthur Maloney, and the then Premier William Davis in respect of an Ombudsman recommendation for the payment of some \$55 million to \$60 million of compensation to former land owners.

The committee was struck, and as one of the first orders of business, its chairman, Jim Renwick, together with a number of committee members, all of whom were members of the legal profession, recognized that the issues could not be addressed in the so-called usual committee format, that it was very adversarial. There were lots of pent-up emotions and lots of interest groups represented. The committee retained counsel as one of its first orders of business and that counsel was me. Thereafter, and until the matter was resolved, that committee functioned as a committee of inquiry, every bit as much as the standing committee on public accounts functioned in the summer of 1986 and the standing committee on the Legislative Assembly functioned in respect of its inquiry into the two conflict-of-interest matters.

The role of counsel from the beginning was essentially twofold: prepare the case, investigate whatever required to be investigated, marshal whatever evidence was considered to be relevant by the committee upon advice from

counsel and thereafter to present the evidence through the form of witnesses. I might say, ironically, I got to ask only one question of one witness in that case and to introduce only one document because it was set sort of like at the eve of trial. Nevertheless, that was the role cast for counsel and for the committee. This committee acted in that circumstance analogous to a committee of inquiry.

The public accounts committee functions in this House in similar ways, but Mr. Philip, who has far more experience than I in that committee, can tell you there are some--a few, but nevertheless significant--differences.

The committee's role grew quite rapidly. I am sure most members in this House are familiar in some detail with the friction that existed between the Office of the Ombudsman and the Legislative Assembly, the government. It was Arthur Maloney's style; it had always been never to do anything second rate and Arthur Maloney did create, in his own words, one of the "finest offices and functions in the world." Because he created that probably in the span of 14 to 16 months, with all of the boastings that accompanied that from his office and the budgetary matters--you might recall some comments by members of the "solid gold Cadillac operation" and "castle in the sky" and things like that--it increased substantially and very quickly the expectations and demands of that office by the House, by members and by this committee.

Not long after the North Pickering matter was resolved, Mr. Maloney tabled in the Legislature, as his act requires him to do, his first annual report. His first annual report mirrored the operation of that office. There was a heck of a lot in it. It was about 600 pages, if I recall, and it had a lot of recommendations for government and recommendations for this committee and recommendations for other things, much of which was controversial and much of which was adversarial.

The combination of the high expectations placed upon the office by the boss, since he is a servant of the Legislature, plus the content of the matters in the report, caused this committee to evolve very quickly. By the way, its role is unique in the world. It is now the standing committee on the Ombudsman, but in respect of its ongoing functioning, it is the means whereby, first, the Legislature is able to determine how the Ombudsman has got on, on an annual basis; and, second, it is the means on behalf of the Legislature in a substantial way of resolving these adversarial issues that have arisen between the Ombudsman's office and governmental organizations, the public servants, for want of a more appropriate word.

0920

Those of you who have read briefing papers and read the Ombudsman's report will see that, in substance, the largest part of his report deals with the so-called recommendation-denied cases. The recommendation-denied cases represent the ultimate, final step an Ombudsman can take in his process. He may only recommend, but he cannot recommend with teeth, and if the governmental organization says no, frankly he is stuck with it. All he can do is go to the Premier, and after the Premier, if nothing occurs at that stage, he may report to the Legislature. Under your term of reference, it is an automatic referral.

To give you an example, the last time I believe--Mrs. Meslin can correct me--there were at least 13 to 15 of these recommendation-denied cases. I understand now that is distilled down to about five, soon to be increased by something you are going to do very soon.

What each of those recommendation-denied cases represent is, in effect, a report of the Ombudsman, after a complete investigation, which says, "I recommend the governmental organization do X," and it represents a position by the governmental organization, "We are not doing X," either for no reason at all or for good and sufficient reason, in its view. That is the state of the art in respect of each one of those cases when it comes to you.

For 11 years now, people have said, "We don't want to sit as a court of appeal; we don't sit as a court of appeal; we don't rehear the case." I do not care what you call this committee in terms of label, but you sit and determine whether the Ombudsman's position is the one that is preferred or whether it is the governmental organization that is preferred, and once you make that decision, you report to the House with your recommendations.

Now here comes the extraordinary feature of your functioning. It is unprecedented in the world, and other than Margaret Campbell's committee of about 10 years ago involving, I believe, the cafeteria food services--and I am not being facetious--where a select committee recommended a matter to the House, I believe this is the only committee that has ever made recommendations to the House which have been adopted by the House and thereafter implemented by the governmental organization.

Before the Ombudsman committee, recommendations of select or even standing committees did get debate and did get attention, but frankly, as you probably know better than I, nothing happened to them.

It does not happen with this committee. That is a very big responsibility that has been imposed over time on this committee. The House has said by its actions, "In the majority of cases, if you come to us with your report and recommend that the Ombudsman's recommendation be implemented, it is assumed, committee, that you have done a very full job on determining whether the Ombudsman's position is right and we will accept it."

I do not mean to say that every recommendation this committee has made for adoption of the Ombudsman's report has been accepted; that is not the case. But if we did a statistical analysis, we would see that it would be in the high 70s, close to the 80s in terms of per cent. The record is extraordinary.

What does that mean? That means that this Ombudsman in this province, unlike any Ombudsman in any other province of this country, and let us stay within Canada, has the unique--I am not sure what to call it--ability to seek enforcement of his recommendation through the legislative process. That elevates the office of the Ombudsman in Ontario beyond that of the others for effectiveness. I do not think anybody would debate the issue that an Ombudsman function is a necessary function today.

What the hell does that have to do with a lawyer on a Wednesday morning? Nobody appreciates better than I what your schedules are like. This is not the only thing you do from seven o'clock in the morning until you leave your office at night. It is not the only committee you are going to sit on; it is not the only legislative responsibility you are going to have, etc. Respectfully, it is physically impossible to do all of the work necessary to prepare these cases before they come to you.

Somebody has to meet with the public servants in question, somebody has to marshal the appropriate evidence and somebody has to prepare an outline of how the questioning should go. Somebody also has to brief you. Once the committee hearings start, somebody has at least to introduce the relevant, factual issues so that committee members can then take over the questioning, so that the record of evidence is complete.

Unlike many committees that function, there is no presumed or anticipated or expected standard of the record of evidence that you want to hear before you issue a report. There is not, in that precise way, in this committee--but there is, because what you are doing is recommending to the Legislature, potentially, that something the Ombudsman recommends, much of which has dollar implications, be adopted, and it is like a court of appeal. I am sorry, Eleanor, but it is like a court of appeal.

Those of you in this room with legal backgrounds know the Court of Appeal does not investigate and present its own cases. There is a need for you both in fact and in perception to appear to have a neutrality, if you will, on an issue before it comes to you, with some slight bias towards the Ombudsman's position, because after all, there is a long, historical relationship.

What do I do? As I say, when these annual reports are tabled in the House, I have a virtually automatic procedure which has been in place in my office now for some years whereby letters go out to each of the ministers or heads of the government organizations in question that are referred to and who are expected to make some response to this committee.

The letters go out and are responded to and meetings are arranged prior to the committee hearings. Eleanor Meslin's office knows automatically now in terms of these cases the evidence that is necessary to be marshalled, which is given to Todd and put in briefing books for you.

I presume to select, on your behalf, the most appropriate witness or witnesses to appear from a government organization, and I do consult from time to time if it is a tough call, but most of the time it is an obvious choice. You will want to hear from the people who are involved with the decision-making process and who have the power to implement something.

When the committee hearings begin, I start off beforehand. For a few minutes before each of the cases start, I give you a briefing on what the issues are in the case and where the case is probably going. Time permitting, it is done in writing so that you have a basis of an outline.

I get the substance of the case and the positions of both parties out for the record, and then the questioning is given to each of the committee members as they may be advised and wish to question. When that is finished, there is a very complete record of evidence.

I assist the committee in deliberations on each of the cases when asked to do so. When all of that deliberation is completed, involving all of those cases, a report is written.

While I used to be fairly heavily involved in the preparation of the report, in the last two or three years I have kind of pulled back from that, and a lot of the report writing has been done by staff other than myself. In

draft, my role is more one of a vetting function or fine-tuning before it gets to the committee for a final review. We all review the reports with the committee before finalization and I am there to discuss.

0930

That is historically and in an evolutionary way what my role has been. Why do you need a lawyer? You need a lawyer who is not paid by anybody around here because sometimes there is a slugging match between the governmental organization and the Ombudsman, or the Ombudsman and this committee or the governmental organization and this committee. I do not mean to overstate the words "slugging match," but sometimes parties are not always ad idem and sometimes it is difficult to establish what the real position is or ought to be.

If you consult with members of staff such as Catherine Evans and others who have gone on previously, they feel uncomfortable if they have had to take on that role. I am, I guess, the hired hand. If I come out of it a bad guy in the eyes of somebody, that is what I am paid for.

As Eleanor Meslin will tell you, I can be a thorn in the side of her office as frequently as I am in the side of the governmental organizations. I was involved in the standing committee on public accounts' enquiry in 1986 and somebody said that I used--what was it?--a firm, nonpartisan hand. That seems to be my reputation around here and this committee has that reputation, which is probably how I have acquired it. It is important for the committee to maintain that. I am egotistical enough to believe--Bob Runciman said the cemeteries are full of indispensable people, but on an ongoing basis, I think anything this committee can do to continue to preserve and further develop that nonpartisan reputation is in everybody's best interests.

I do not do everything this committee does. There are some things I do not do and have not done for a lot of years; estimates, for example. I am redundant at estimates. Frankly, I would not know what questions to ask. Latterly, I do not even attend those meetings unless there is some issue that I have been alerted to before.

There is another process this committee has called a steering committee or subcommittee which has a number of responsibilities, one of which is to receive communications from the public and to consider those and then report back to the committee as a whole on whether any actions were taken. For about four to five years now, I have not been involved in that process, unless on a specific case where I have been asked for a legal opinion or to know some specific thing.

That is pretty well it in a general sense unless any committee members have specific questions about what I do or what my work is. I get bottom-lined. This committee functions extremely well. Members of other committees, members of the House and members of the executive who have been exposed to this committee's operation over the years have commended it highly in respect of its operation. This committee has been the subject of articles written by scholars internationally, commending it and extolling its virtues, etc. Do not worry; I am not going to take credit for all that.

What I am saying is that there is a package that is already together that is responsible for that. If you take out one of the components of the package, there is a risk that you are not going to--if you decided today that you had had enough of John Bell, for whatever reason, that would be fine, but

I would be leaving this room kicking and screaming at you to replace me. The question is not really whether it is to be John Bell. The question is whether you do need a counsel independent of the Office of the Assembly, etc., and the answer, from me at least, is a resounding yes.

Mr. Pollock: I take it from your comments that you are a firm believer in the Office of the Ombudsman. One of your comments, if I interpreted it correctly, was that the Office of the Ombudsman here in Ontario is head and shoulders above that of any other jurisdiction in this country or in the world. Naturally, we have to take your word for that. Is there any other place in the world or in this country where you recommend we go to study the Office of the Ombudsman?

Mr. Bell: As you have probably already gathered, my answers tend to be long-winded. Let me give you another long-winded answer. This committee travelled in 1978. The reason it travelled in 1978 was that for two years Arthur Maloney continued to tell this committee what happened in all the other jurisdictions of the world he had visited. As his first order of business, when he was appointed Ombudsman, he travelled around the world. He visited significant key ombudsman offices. He put together something called a blueprint that was about 1,200 pages.

Please do not misunderstand me. I have immense respect for Arthur Maloney. He was a brilliant trial lawyer and he was playing it like a trial. He would continue to say to the committee members and to me when issues came up about, "Should you be doing that?" "Well, in Sweden and Copenhagen and Israel they do it." This committee said in 1977: "My gosh, we keep hearing this. We are sure Mr. Maloney is telling us the truth but sometimes you get different flavours. If he's gone to talk to ombudsmen, what if we went to talk to legislators?"

The committee travelled to Scandinavian countries, to Israel, England and Scotland. It is one of the reports I commend to you. I know you are not going to have a lot of free reading time, but it is the fifth report, I think; 1978. The committee concluded that yes, things were done differently in other jurisdictions. Some of them had application to this province and some of them did not.

Ombudsman committee trivia: After that trip, the relationship between the then Ombudsman and the committee changed dramatically. As you may recall, Mr. Maloney resigned in August 1978 in a--well, I will not go any further. Yes, I am a supporter of the office and if you as a committee were to ask staff, including myself, to present a list of jurisdictions that might assist this committee in such a venture, we would be pleased to do so. It is also relevant because one of the outstanding items on your agenda is the expansion of the Ombudsman's jurisdiction, which Dr. Hill has urged this committee to consider and which one of your predecessor committees decided it would undertake. One of the things you have to decide is how, when and how extensively. There is certainly room for travel to fulfil that mandate.

Mr. Philip: Maybe I can add to what John has said. I also think it has been useful to attend the conventions of the ombudsmen. There was a subcommittee that went to Stockholm for the international convention--was it in 1981 or 1982, Eleanor?

Mrs. Meslin: It was in 1984.

Mr. Philip: It was 1984, and also it went to the Canadian convention

in British Columbia. I think Dan Hill had just started his position when we went to British Columbia. At that time, there was a leading Ombudsman who was in the middle of his career and it was very useful to meet with him and his staff and with some of the legislators as well. Unfortunately, in BC they are so polarized in everything that the Ombudsman, in some ways, was a voice crying in the wilderness with problems our ombudsmen do not usually face in this committee. None the less, it was useful in finding ways in which we could recommend some improvements in our operations from looking at the operations in British Columbia.

0940

Madam Chairman: Unless you have something further, we are going to try to get our budget passed. We will have you back soon.

One person I am not sure everyone has met is Catherine Evans, our legal researcher. Is that your proper--

Ms. Evans: Legislative research; coincidentally, I am a lawyer. I function as a research officer.

Madam Chairman: You have before you the budget which the clerk has prepared. Does everybody have a copy? This budget is until March 31, 1988, because that is the end of the year. This is the one we would take to the board on Monday, December 14. We have put in for 16 days of meetings before the end of March. It is expected that would include looking over the annual report, the five remaining denied cases, any special cases that might come before us, the estimates and consideration of whether we would have time in that period to discuss the expanded jurisdiction of the Ombudsman and any other cases that come before the committee.

The travel per diem is for the six members who live outside the Toronto region. They get one day's travel to come in per week of sittings or per session of sittings. There are the meal expenses for the committee members, and the professional services, legal fees, at the \$100 per hour rate.

Mr. McLean: Is that our hourly rate that is quoted there? The legal fees are \$100 an hour. The \$68 per member, is that our hourly rate?

Madam Chairman: That is our daily rate.

Mr. McLean: Oh.

Mr. Pollock: Good try, Allan.

Interjection: You could try it on the board.

Madam Chairman: Would it be the recommendation of the committee that I try that on the board?

The professional services are \$100 per hour, which motion we passed last week, recommending that the base rate be moved from \$85 to \$100 per hour. The clerk sent along our motion to the Board of Internal Economy and it suggested we put that in the budget at the \$100 per hour. We have estimated at 100 hours, given that the year-end is March 31. The others are miscellaneous items from printing a report right through to long-distance telephone calls.

Does anybody see anything missing from the budget or is there some other consideration?

Mr. McLean moves that the chairman present this to the Board of Internal Economy for its approval.

Seconded?

Mr. MacDonald: I will second that.

Madam Chairman: Thank you, Mr. MacDonald.

Motion agreed to.

Madam Chairman: The second thing is with respect to when we should first look over the estimates that all of you, I believe, received with the expanded jurisdiction paper last week following the meeting. There are two alternatives at this point. We have five hours allotted for our discussion on estimates. If we meet next Wednesday, which is December 16, we may have to wait for our next meeting until January. Could I hear your preference whether we want to split up the discussion and start it on December 16 or whether we want to wait until we are sitting during the month of January, supposing we get a January date.

Mr. Philip: There is no requirement that we use the full five hours for the estimates. In the past, this committee has only allotted one session for the estimates and we have usually found that is sufficient. The same thing is true of the Provincial Auditor, where I will be suggesting tomorrow that we try to do it in the three hours; then, if some members feel that they are being cut off or that they have some vital issues they want to bring up, they can always carry it over.

Madam Chairman: So you would suggest that we try to fit it in on December 16?

Mr. Philip: I would suggest that we try to do it on December 16. There has also been a kind of apprehension by some members of the House about doing estimates when the House is not sitting, for a variety of reasons. This committee has always, historically, done them out of session for the simple reason that we were a select committee; but once we started to be a standing committee, we started doing the estimates when the House was sitting, so I think it would be in keeping with that.

Mr. McLean: I find it difficult to do it next week. I do not know. There seem to be so many things on the schedule. I know I have another committee meeting the same day, Wednesday. I would sooner do it when the Legislature is not sitting. That is my preference, but the committee will rule.

Mr. Bossy: I believe there is some reasonable agreement between the parties concerning the break that we are going to have and also the possible return. As most of you know, we are returning for about three days, or whatever it might be. I would say for this committee that it would be nice if we had a good time to do it, if we could schedule that in as our meeting during those three days of return, and that would be in early February.

Mr. Philip: That is a really good idea. That meets your needs. Do we have an agreement on that?

Madam Chairman: Any further discussion? Do we agree to meet February 10, the Wednesday, when we are back for the interim time? Wednesday, February 10, at 10 o'clock. Everybody in favour?

Agreed to.

Madam Chairman: Goodness me. It passed.

With regard to time for sitting to discuss the cases denied and the review of the Ombudsman's annual report, there is a suggestion, because some of our committee members are on other committees that will be travelling during February or are highly committed, that we try to meet the second and third weeks in January and try to slot in a two-week schedule in that period. Is there any discussion on that? Can we get that?

Mr. Bossy: Well, I can always get a replacement, but I am committed for the first two weeks of January. It seems that members tend, because of the holiday situation--the first two weeks of January--

Interjection: It's the last two weeks.

Madam Chairman: The suggestion is the week of January 18 and the week of January 25.

Mr. Bossy: That would be two of the four weeks that we plan to sit on this?

Madam Chairman: That is correct. Do you feel more comfortable with that, knowing those dates?

Mr. Bossy: Well, I am just wondering. The other committee members here may have some suggestions. We have to indicate if we have some plans for holidays so that you can get a majority at a certain time and there is a flow. I would like to see it that we continue so that, when we do get into some of these cases, we do not have breaks between. If you start it but then there is a break, then your mind gets shifted quite often because of the many duties or committees that we have.

I do not know. Personally, as a time slot for our four weeks, I would have liked to have seen them run consecutively after the February break, and then run our four weeks consecutively. Whether that is possible, that is for the report.

Mr. Bell: Sorry, my apologies. In terms of budgetary items, I forgot to suggest something that will effect a cost saving. My retainer should be amended, I believe, to indicate that some services may be performed by members of my firm at a rate less than the maximum counsel rate. I have a lot of young lawyers and clerks who can do some things at a lesser rate. Todd will tell you that some of my accounts have indicated that in the past, and Todd has had to write back saying, "Well, the \$70 an hour you charged for such and so, you can't have it." It does not make a lot of sense. If the goal is to get maximum benefit out of the maximum budgetary item, if you add that in, you are going to get maximum benefit.

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You know what I will do. I will put as much as possible of the preparation work on to people in my office at the relatively lower rates to effect the savings to you. It is just a suggestion.

Mr. Philip: Are you suggesting some of that 100 hours could be done by somebody other than you, or are you suggesting that you may need to give some time in addition to the 100 hours to someone else?

Mr. Bell: Well, I think if you work from the \$10,000 amount backwards, it may end up to be 135 hours, but they may be spread over four people, the total of which is not to exceed 100. So effectively, to this committee, you have got 135 hours' worth of somebody's time. It is a bit ridiculous to say, "Bell, you are the only one who can phone up or go up to Queen's Park and pick up a document or talk to somebody about something for five minutes." If I can delegate that to somebody at \$65 to \$70 an hour, you can save \$40.

Madam Chairman: Would it be acceptable if we passed a motion to say that the legal fees of \$10,000 are a maximum and that they could include your services at \$100 per hour or any other services adding up to \$10,000?

Mr. Bell: The services of any other member of my firm, as is advised in the circumstances. I think that would do it. That way the Board of Internal Economy will pass those accounts through.

Madam Chairman: Is that amendment to the budget acceptable, to include any other member of his firm, to a maximum of \$10,000?

Agreed to.

Madam Chairman: OK, we will add that to the budget.

Back to the discussion on when we should sit to discuss the subject matters put before us. Mr. Bossy has suggested that rather than sit for two weeks, from January 18 through to the end of January, we commence sitting on February 15 or February 16 and go for four weeks straight. Could I hear from other members?

Mr. Pollock: I will go along with that.

Madam Chairman: You will go along with that, Mr. Pollock?

Mr. Philip: I would probably have trouble with that because I chair another committee, and the other committee has to meet with some people from the House of Commons. The problem is that I am my party's spokesperson in the standing committee on the Ombudsman. It means, then, that you may end up with the official opposition not having their spokesperson. I am sure that Mr. Charlton will do an excellent job and I can substitute someone else in. No doubt the House leaders will decide anyway when we sit, because they are going to deal with a whole bunch of conflicts. There are just too many committees sitting at the moment.

One suggestion might be to allow the subcommittee, which I assume was elected last week, to deal with it. Members can talk to their representative on the subcommittee, and the subcommittee can in turn talk to the House leaders and try to work out something.

We have usually found that we have fewer conflicts in this committee if we sit early in the Christmas break, because other committees tend to want to sit in March and February; therefore, there are fewer problems.

Madam Chairman: --the same committee that you are on, the select committee on constitutional reform or something in February as well.

Mr. Philip: The standing committee on public accounts.

Mr. McLean: Could we not put in three weeks straight before the Legislature comes back?

Madam Chairman: The suggestion is that we put four weeks in our budget but that in fact we may need only two weeks to discuss the annual report, the cases denied and perhaps any special reports that might be before us. So in fact our four-week estimate may be in excess, and we are just waiting for the question of whether we have special reports, whether it would be within our jurisdiction to consider choosing a new Ombudsman, whether that would be done before the end of March or after and whether the expanded jurisdiction question is delayed until the summer. In fact, we may need only two weeks.

Mr. McLean: If we meet the weeks of January 18, January 24 and the first week of February, if we only need two weeks, that would be fine; but if we need three consecutive weeks, we have got it there.

I agree with Mr. Philip. I think there is going to be a real problem with scheduling in March, a real problem.

Madam Chairman: The subcommittee can decide, but it is my understanding that we should make some suggestion--in writing, anyway--as to dates.

Mr. MacDonald: I would rather see it the last two weeks of January and the first week of February. Now, this is for personal reasons. I have to have a hip replacement and I am booked to have it done in the latter part of January. I do not want to bring personal things into this, but that is the size of it.

Madam Chairman: But your presence is important.

Mr. Charlton: I certainly have no problem with the last two weeks in January and the first week in February.

Madam Chairman: Shall I put forward a motion that we request the last two weeks in January and the first week in February, if we require it?

Mrs. Meslin: I was just wondering about the first week in February. Earlier on, John Bell had said that for the first two weeks in February he is not available. If you are talking about recommendation-denied cases, in the first week in February you could have a problem if you decide to retain him.

Madam Chairman: We are requesting the last two weeks in January and anticipating that we will not require any further time, but that still allows us permission to sit. I think that is what is on the table, because there are a number of people who will not be around in the first week in February. The anticipation is that we try to get it done in that time.

Mr. Philip moves, seconded by Mr. Carrothers, that the committee request the last two weeks in January and the first week in February in case we need it.

Motion agreed to.

Madam Chairman: With respect to the expanded jurisdiction question, I am assuming that our committee will undertake to review that at the request of the Ombudsman. Is anybody opposed to considering the paper that has been put forward by the Ombudsman on expanded jurisdiction?

Mr. Philip: I think it is important that we have public hearings on that. I think you are in agreement with that, since we talked about it earlier. It is such an important matter that I do not see us doing it in this break. Probably September would be a good time, when groups are back and can get their act together, depending on when the House is coming back; either that or early after the House recesses. It is just going to require too much time to do right now.

I think some groups that may have a particular interest should be given plenty of warning so that they can prepare their papers, have their meetings and be ready to make a presentation. If we suddenly start scheduling open hearings for February or March on this matter, a matter that is really quite important, I think, we are going to be accused of trying to railroad something through without giving the interested groups adequate time to prepare. So I just do not see us dealing with it at this time.

Mr. McLean: I think it is a very big undertaking for this committee to revise what is already there. Just vaguely having gone through some of the Ombudsman's recommendations and reports, I think it is going to take some period of time to do that.

I agree with Jim and probably some of the other members here that maybe we should be looking at some other jurisdictions and how they have expanded, if they have expanded and what is the role they play. Interviewing people before the committee, I think, is going to take quite some time, but let us do it right. I would certainly like to find out what some other jurisdictions are doing.

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Madam Chairman: I have undertaken on behalf of the committee to ask Catherine Evans to look into the other jurisdictions and what Ombudsmen are doing, so we could at least have in front of us a variety of jurisdictions to consider. At that time, we could discuss whether any of them would be worth looking at. I hope that is acceptable to the committee. It will give us something to review. I think that some time in January we will have a draft of this; then we will have some idea of what other jurisdictions we might be prepared to look at in considering the expanded jurisdiction question in addition to the public hearings. Are public hearings acceptable? Would that be the proper route to go?

We will be going to the Board of Internal Economy on Monday, December 14. We will see if our budget will pass and we should know within what time line we will be meeting over the break.

Mr. Philip: On a different matter. I am wondering if Catherine can prepare, or maybe the subcommittee can look at it, some kind of position outlining why, with the help of the Ombudsman, this committee should be the one that interviews for the new Ombudsman. If we are not careful, we could be left without any kind of input into who the new Ombudsman is. Certainly, this is the committee that is best in a position to decide or to have the input into who the new Ombudsman is, not another committee.

We have not been successful with that other committee in one of our other presentations.

Madam Chairman: Would the committee like that suggestion? I gather the Ombudsman's term ends because of retirement in March or June of 1988.

Mrs. Meslin: Officially, he is finished in February 1989. Most likely with vacation and everything you back it up.

Mr. Philip: If I am not mistaken, the act does allow a one-year extension, does it not?

Mrs. Meslin: I am not sure, but it does not relate to retirement. I think it is a one-year extension on a regular 10-year term. His term ends because he is stopping at 65.

Mr. Philip: It seems to me that in the case of Mr. Morand, it was not just the 10-year term, it was also the age, if I am not mistaken. There was at that time some discussion of a one-year extension.

Mrs. Meslin: I do not know.

Mr. Chairman: We can look into that. We will ask Catherine to prepare something that would voice our opinion that perhaps we would be the right committee to review or to consider the selection of the new Ombudsman who would replace Dr. Dan Hill. We will be back in touch as to when our next meeting is. Is there anything else?

Mr. Bossy: What are the hours of sitting? We normally have been sitting at 10 o'clock in the mornings. I do not know how the other members find it, but one needs nearly an hour in one's office to set the tone for the day within the office and to catch up on some of the work. To start sitting at nine eliminates any time the member has within his or her own caucus.

Madam Chairman: This week we have started at nine o'clock to accommodate Mr. Bell, who was able to come only at this time. He had an appointment at 10. Normally, we are scheduled from 10 until 12 during regular sitting times.

Mrs. Meslin: I have two quick questions. Is the committee meeting next week and will they need me?

Madam Chairman: No, the committee will not be meeting next week. It was decided that everything else requires full days except for estimates, which will be discussed on Wednesday, February 10.

Mrs. Meslin: Can I have some direction about when the subcommittee on communications will meet, because the complainants in a couple of cases that Mr. Bell has been investigating are now asking about them?

Mr. Lupusella: Who are the members of the subcommittee?

Madam Chairman: Myself, Mr. Philip and Mr. McLean make up the subcommittee. I thought we would meet just quickly after today. If Mr. Bell's fees are approved on Monday, we may be able to meet next Wednesday morning and discuss the two cases that he is currently working on.

We should definitely try to get together before the Legislature resolves on December 17, or whatever the proper terminology is.

Mr. Lupusella: Is the subcommittee going to operate independently, or is the decision-making process going to be brought to the attention of the committee?

Madam Chairman: It will be brought back to the committee. It will work independently and then make recommendations to the committee at a later time.

Mr. Lupusella: The approval is coming from the committee, not from the subcommittee?

Clerk of the Committee: The terms of reference of the subcommittee that passed last week authorized the subcommittee to make decisions, and only in cases where unanimity lacks in the decision-making process would it be referred back to the committee. Whether the decision is made unanimously or not, the decision of the subcommittee would be reported back to the committee.

Mr. Bossy: This is just for my information because I do not really know. Has the Ombudsman's committee in the past--Ed could probably fill us in on that--ever travelled and made a decision outside of the chambers here? What I am trying to say is that we know that we talked about the visibility of the Ombudsman throughout the province. Has there ever been a case that was heard by the Ombudsman's committee other than at Queen's Park?

Mr. Philip: We had hearings in northern Ontario, through northeastern Ontario one year, and then two years later through northwestern Ontario. The result of that was a report. Some of the matters that were contained in that report were not necessarily what we would deal with as cases denied. We dealt with a couple of cases denied in these jurisdictions to demonstrate to people how the committee worked, but they were not cases directly related to that particular community. In other words, they were to show the people in those northern communities how the Ombudsman's committee works.

In addition to that, we reported back on such things as terrible fire hazards in certain public housing projects in certain parts of northern Ontario and made our concerns known to the various ministries in a special report.

Mr. Bossy: I see. The north seems always to feel that it is in an isolated area and not close to the scene. I know the cost of taking the committee into Sudbury, or wherever it may be, to sit in an official capacity and act on a case denied where there are witnesses to be called and that type of thing. Has that ever been done?

Mr. Philip: The only witnesses we ever call are the public servants involved and the Ombudsman. We do not call the original complainant because we are not a court of law. We have done a couple of cases denied up there.

In terms of the cost, one of the things we found was that to bring the whole committee into northwestern Ontario was very expensive. One of the things I proposed, that was under consideration before, was the possibility of teaming up through the Attorney General's office and dividing the committee into subcommittees that could travel into some of the native communities with the judges when they go in. These planes carry four or five people and they

are going anyway on court trials and other business. We could then meet centrally and pool some of the information we have.

We could have a researcher or a clerk with us, somebody from the Ombudsman's office and maybe one, two or three committee members. If we did that, if we look at the map of northwestern Ontario, most of the committee could go there. In northeastern Ontario, we would require only one group to cover most of northeastern Ontario. We could cover most of the bands that way, and it might be something for the subcommittee to consider. I hope I can find all of those maps. Catherine no doubt will come up with them.

Mr. Bossy: I have not seen the latest figures from the Ombudsman. As the popularity of the Ombudsman's office has increased and, I gather from people in my community, there are more people talking about using the Ombudsman's office, it would be interesting to have the figures over the last three years to see how the case load has increased from one year to another. That will also help to determine the expansion of the Ombudsman's office.

Mr. Philip: It is very expensive to take the whole committee, if you are talking about that. We were so far north that if we had flown south from Toronto we would have hit the tip of Venezuela. It is amazing to feel a province in that way. Some of us southerners who do not get up that far very often had a real learning experience. I think it is useful for members to go up there. I just worry about the cost of taking the whole committee and doing what we did, because we did not cover an awful lot of territory. I think we could cover an awful lot more if we were more creative in our approach.

Madam Chairman: Any further discussion?

The committee adjourned at 10:12 a.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1986-87
WEDNESDAY, JANUARY 20, 1988
Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:

Cleary, John C. (Cornwall L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman

Keil, Martha, Assistant Director, Investigations

From the Workers' Compensation Board:

Glasberg, Irwin, Executive Director, Review Services Department

Boyd, John, Former Ombudsman Administrator, Review Services Department

Walker, Peter, Director, Review Services Department

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, January 20, 1988

The Committee met at 10:10 a.m. in committee room 2.

Madam Chairman: Perhaps we can call this to order. We have before us today two representatives, the Ombudsman, Dr. Hill with his Executive Director, Eleanor Meslin, and we have Mr. Irwin Glasberg from the Workers' Compensation Board.

I believe Dr. Hill has some opening remarks. We would like to turn it over to you, if we may.

Dr. Hill: Thank you, Madam Chairperson. Madam Chairperson, Committee Members, I would first like to express my pleasure in meeting the Members of this new Standing Committee on the Ombudsman.

Our meetings are of vital importance and if I can use the past as precedent, deliberations ahead of us will be interesting, I hope amicable and, indeed, just.

I am sure that your Counsel, John Bell, who is more experienced in this process than any of us in this room, has provided you with a thorough and a helpful briefing.

In view of the short time we have available to us, I will not be able to discuss the more general operation of my office with you at this particular time, as is usual at the beginning of our meetings. Instead, I have asked that we go immediately to a discussion of the cases in which the governmental organizations have denied my recommendations. This, I believe, is our most important work.

In the resolution of these complaints, you are my final recourse or, if you will, the last arrow in the Ombudsman's quiver. This Committee's role is the final resort to these complainants and its responsibility to review the actions of the governmental agencies involved in a just and impartial light cannot be over-stressed.

I, of course, believe that my investigative results support the recommendations I have made or I simply would not be taking up the Committee's time. Nevertheless, I recognize that the Legislature, in establishing my office, provided that the final determination as to whether my recommendations should be implemented would be made through the political process, a process which has been delegated to you.

In the past, the Committee has reviewed cases I have

brought to them without reference to the party allegiance of the Committee Members and in this process has, I believe, made just and impartial decisions. I hope that our present deliberations will continue the long-standing good reputation of both the Committee and my office.

On the topic of Recommendation Denied Cases, I am pleased to report that 16 of the 22 cases originally cited in my Annual Report, which you were to have to deal with, have been equitably resolved and to my satisfaction.

I attribute this result to commendable cooperation on the part of the governmental organizations concerned and to our own efforts to establish a mediative and conciliatory atmosphere in our working relationships with the agencies involved.

In my view, justice itself is never, ever negotiable; however, achieving the desired disposition without sacrificing the issues involved in all 14 of the cases has strengthened my belief that mediation and conciliation are valid, appropriate and invaluable techniques for complaint resolution.

As each case is presented, I will provide the Committee with a very brief statement of my view as to the merits of the complaint. Once I have commented, I will be depending upon my Executive Director, Eleanor Meslin, and staff of the Director, the lawyers on my staff, to provide you with the details of our findings and the answers to any questions you may raise.

Again, let me say how pleased I am to meet all of you and reiterate my confidence that our deliberations will be fruitful. We share the same goal; to be effective agents of administrative justice for the people of Ontario. I and my staff look forward to working with you to achieve this goal.

Regarding the WCB cases, Workers' Compensation Board cases, as the Committee is aware, the first four cases we are discussing with you concern the Workers' Compensation Board. Before providing you with comments on the individual cases, I would like to make some general comments about the process and express some of my concerns about the delays that have occurred and the manner in which the Board has responded to my reports.

As you will see, looking at the documents, in these cases, there are often long, long delays between the issuing of my letter to the Board, stating my tentative conclusions and recommendations, and any response from the Board to my views.

In some cases, I have had no official written response; in others, the matter was discussed with the Board months and even years after my final report. These delays cause me

great, great concern; nevertheless, I believe the Committee, which was set up at the Board to assist us in resolving complaints, has been useful in many ways. The mediation process has proven very successful in resolving a number of the cases we discuss. I cannot, however, accept that long delays are necessary.

I must also comment on the Board's provision of information to me and my staff just prior to these hearings. In the case of Mr. U, the Board's Ombudsman Administrator requested medical information from the Board's Senior Medical Review Consultant on January the 11th, 1988, this year, and I received this medical information on January 18th, 1988, this year.

I do not believe it is appropriate for the Board to provide new information at this very late date. The Committee has, in the past, made it very clear that it will support the integrity of the Ombudsman process and in its report on the Argosy investigation, the Committee indicated that it would not in future allow a governmental organization to provide information in such an untimely fashion.

I urge the Committee to consider the appropriateness, the appropriateness of allowing this new information to affect the outcome of the Committee's deliberations on this matter.

Madam Chairperson, I turn now to our first Recommendation Denied Case.

Mr. Bell: Dr. Hill, before you do that, it is your intention, I take it, to make your comments respecting the first case; i.e., Mr. Q, and then the Committee Members and myself will have an opportunity of questioning you and members of your staff before we get to any of the others--

Dr. Hill: Yes.

Mr. Bell: --rather than make all of your comments about all four?

Dr. Hill: No, one by one.

Mr. Bell: Okay.

Dr. Hill: We will go about Mr. Q first and then, I gather, as you say, the deliberation, then the next one, then the next one.

Mr. Bell: Just while there is an interruption, the matters that you have raised thus far, the comments and concerns, I propose that they be dealt with as and when they arise in these particular four cases.

I have already alerted Mr. Glasberg that some of these questions will come and I know he has some answers prepared already, so if that is acceptable to you, we can proceed that way.

Dr. Hill: That is fine. Should I then proceed?

Mr. Bell: For the record, we are now going to start the Committee's consideration of the Recommendation Denied Case involving Mr. Q, which is in Tab C, Members, of your briefing material. Yes, Dr. Hill?

Dr. Hill: Mr. Q: The first case for your consideration involves Mr. Q's request for entitlement for a noise-induced hearing loss and tinnitus. Mr. Q has an asymmetrical hearing loss which, according to the best medical evidence, is the result of working in a noisy environment. His tinnitus, according to the noted specialist who reviews approximately 600 Workers' Compensation Board hearing loss cases annually, is also most probably related to his work.

It is also important to note that in four previous hearing loss cases investigated by my office on the same issue, I concluded that the Board had been unreasonable to deny entitlement. In all four cases, the Board accepted this conclusion and granted entitlement to the complainants.

Consequently, I have great difficulty in understanding the Board's position that it should not pay in this case. I would ask the Committee to support this case and allow Mr. Q entitlement for his hearing loss and tinnitus. I believe the medical weight is clearly in favour of Mr. Q and that there can be no compelling reason for the Board to accept four cases and deny this one.

I would appreciate the Committee's support in this matter and, Mr. Counsel and Madam Chairperson, I now turn the deliberation, my part of it, over to my staff and my counsel.

Mr. Bell: Thank you, Dr. Hill. Who will be speaking specifically on this case?

Dr. Hill: Martha Keil, the Assistant Director, who has handled all of the WCB cases.

Mr. Bell: Because space is such a premium, so are microphones. Could we arrange for her to --

Dr. Hill: I will get up.

Mr. Bell: Because this is the first Recommendation Denied Case that the Committee has considered, not only during this session, but for quite some time, I would like

to be more deliberate than might otherwise be the case and as you will review the matter of the complaint, your investigation thereof, the opinions formed, conclusions reached and recommendations made, I would like you to pay particular attention to the documentation at the various stages, relating that documentation to your statutory and procedural process.

Having said that, the first document in this part is a legend that has been prepared by your office; is that correct?

Ms. Keil: Yes.

Mr. Bell: What follows is a five-page synopsis. Now, the Committee already knows that this synopsis is intended to be an agreed statement of facts settled before the Committee's hearing between the parties.

Are you able to confirm that that, in fact, is the case with this document?

Ms. Keil: Yes, it is.

Mr. Bell: All right. Well, if you might, first, with the benefit -- no, let's do it this way: Can we just take a quick trip through the documentation before I ask you to come back and review the matter, using the synopsis or any other piece of material?

At page 6, there is a decision of the Appeal Board of the Workers' Compensation Board?

Ms. Keil: Yes, sir.

Mr. Bell: I am afraid you are going to have to say "yes" or "no" for Hansard or they will get a headache.

Ms. Keil: Yes.

Mr. Bell: That, I understand, is the decision that the complainant complains of?

Ms. Keil: Yes, it is.

Mr. Bell: It represents the substance of the complaint he brought to your office?

Ms. Keil: Yes, it does.

Mr. Bell: Page 7 is a letter, written to Dr. Hill from presumably a representative of the complainant?

Ms. Keil: Yes.

Mr. Bell: Does that just further explain the circumstances of the complaint?

Ms. Keil: Yes.

Mr. Bell: We, then, have a letter at pages 8 and 9.

Ms. Keil: Yes.

Mr. Bell: You can confirm that that is Dr. Hill's 19(1) letter--

Ms. Keil: Yes, it is.

Mr. Bell: --sent to the Board, advising it of the complaint he received and his intention to so investigate?

Ms. Keil: Yes, it does.

Mr. Bell: All right. Page 10, is the Board's initial response to the 19(1) letter--

Ms. Keil: Yes, it is.

Mr. Bell: --showing that a file, the Board's file will be photocopied in its entirety and sent over to the Ombudsman's Office in due course?

Ms. Keil: Yes.

Mr. Bell: That, you can confirm, is the investigative procedure that exists between your office and the Board's office?

Ms. Keil: Yes, it is.

Mr. Bell: You get copies of everything they have got pertaining to it?

Ms. Keil: Exactly.

Mr. Bell: Right, right. Obviously, you can confirm that was done at some time during your investigation of this case?

Ms. Keil: Yes, it was.

Mr. Bell: All right. The next document is a five-page letter, starting at page 11 through 15 inclusive?

Ms. Keil: Yes.

Mr. Bell: You have confirmed that that represents Dr. Hill's 19(3) notice to the Board?

Ms. Keil: Yes, of his possible conclusion/recommendation.

Mr. Bell: Right. There is another letter, it is from Dr. Hill to Dr. Elgie on page 16. It looks to be a letter, inviting a response to the 19(3)?

Ms. Keil: No, I am sorry. That is the covering letter to the final report.

Mr. Bell: Good point, all right. Just to finish the chronology, before we go back, there is a four-month period, almost five months between the 19(3) letter and Dr. Hill's report under 22(3) to the Board?

Ms. Keil: Yes, there is.

Mr. Bell: The documentation is devoid of a response from the Board to the 19(3)?

Ms. Keil: Yes, it is.

Mr. Bell: In fact, no response was received?

Ms. Keil: No response was received either from the employer's representative or the Board.

Mr. Bell: Do you know the reasons why?

Ms. Keil: I do not know the reasons why the employer chose not to respond and I would not care to speculate as to why the Board did not.

Mr. Bell: No. I just asked you if you knew the reasons why. Now, page 17 is just a covering letter.

Ms. Keil: Um-hmm (affirmative).

Mr. Bell: Pages, starting at page 18 through to page 22, that is Dr. Hill's 22(3) report--

Ms. Keil: Yes, it is.

Mr. Bell: --with the recommendations set out therein and can be found really on the last page, page 22?

Ms. Keil: Yes, in the last paragraph.

Mr. Bell: These are the recommendations, which have been, to use the language of the Committee, I guess, denied by the Workers' Compensation Board?

Ms. Keil: Yes, they have.

Mr. Bell: Now, to complete the chronology, at page 23

is a letter from Dr. Hill to the Premier and, again, note before I ask you a couple of things about that letter, October 8th is the 22(3) report, March the 30th is a letter to the Premier.

Do we take it that in the interval, there was again no response received from the Board to Dr. Hill's formal report?

Ms. Keil: There is no written response that was received. In fairness to the Board, there were discussions between our two committees as to this case, but no resolution was agreed upon and no formal response was received.

Mr. Bell: Did you, at some time subsequent to October the 8th, learn from the Board by any means what their position was?

Ms. Keil: We had a meeting last week in which their definitive reason for not accepting the claim was advanced.

Mr. Bell: Let me ask it this way: Between October 8th, 1986, and March the 30th, 1987, had you been informed by any means what the Board's position was?

Ms. Keil: No, I was not.

Mr. Bell: Did your office seek to learn of that position during that interval?

Ms. Keil: Yes, we did.

Mr. Bell: By what means?

Ms. Keil: I called monthly.

Mr. Bell: With what result?

Ms. Keil: The result that is before you.

Mr. Bell: No response?

Ms. Keil: Yes.

Mr. Bell: Did you receive any explanation during that time why no response had been forthcoming?

Ms. Keil: They were discussing it in light of their proposed policy changes.

Mr. Bell: We will talk about those in a while. You mentioned a meeting last week.

Ms. Keil: Yes.

Mr. Bell: Did you learn of the Board's position at that meeting?

Ms. Keil: Yes.

Mr. Bell: Was it given to you in writing?

Ms. Keil: No.

Mr. Bell: Does the position continue to be, as you understand it, not to implement the recommendation?

Ms. Keil: Yes, it does.

Mr. Bell: All right. Now, the letter, page 23 that we have referred to--

Ms. Keil: Yes?

Mr. Bell: --you can confirm that this is Dr. Hill's notice to the Premier pursuant to Section 22(4) and (5) of the Ombudsman Act?

Ms. Keil: Yes, it is.

Mr. Bell: Page 24 is a letter for information to Dr. Elgie, telling him that Dr. Hill has sent the matter to the Premier?

Ms. Keil: Yes.

Mr. Bell: Page 25 obviously is a letter from the Premier, acknowledging the report--

Ms. Keil: Yes, it is.

Mr. Bell: --and making comments with respect to Dr. Hill's actions. That is the last document we have in this material?

Ms. Keil: Yes, it is.

Mr. Bell: While we are still on chronology... No, I think that is it.

Madam Chairman: Mr. Philip, you had a question?

Mr. Philip: Do you keep records of your monthly phone calls in matters like this?

Ms. Keil: I usually do, but in fact, there were always a number of cases that I would discuss with the Ombudsman Administrator, but yes, there are some notations in the file.

Mr. Philip: Will those notations, if we were to look at them or if you could share the information in them, indicate the exact person that you were speaking to at the Board? Was it usually the same person in this particular case?

Ms. Keil: Yes.

Mr. Philip: What level would that person be in the administration of the Board?

Ms. Keil: It was the Ombudsman Administrator, who was one of the Members of the Committee to Review Appeal Board Decisions.

Mr. Philip: Am I correct that the same answer was given each month, that it was in the light of new policy directions that no action was being taken on this particular case?

Ms. Keil: No. Sometimes the answer was that they were planning on discussing it at committee meetings and sometimes the answer was that they were hopeful that a resolution could be achieved and sometimes the answer was that I should be patient.

Mr. Philip: So basically, you got different answers or inconsistent answers during the different phone calls with the same person?

Ms. Keil: I would not say that it was inconsistent. We always were aware that they were planning at some date to change the policy and, in fairness, that would be the overriding.

Mr. Philip: On each occasion, did you express your concern about the time delay and the fact that you would be taking the matter to Dr. Hill directly?

Ms. Keil: Yes. Yes, I did.

Mr. Philip: At which point would you have told them that you had no recourse but to go directly to Dr. Hill with the matter?

Ms. Keil: I probably would have said that, in my opinion, this delay was unjustified and it was prejudicing the worker's interests and Dr. Hill would have no choice but to -- this would have been before March 30th -- would have no choice but to report it in his annual report and take it up with the Standing Committee, but that I would hope we could settle it before then, especially in light of the fact that we had settled cases before on the same point.

Mr. Philip: One last question on the chronology. You mentioned that in your phone calls with the person at the

Board, that you often dealt with a number of cases.

Ms. Keil: Yes.

Mr. Philip: Is this typical of the kind of response that you are now receiving from the Board on several cases or is this an exception, then, that -- Dr. Hill, in his comments, said that the major problem is the delay of the Board.

He has commented on that in other reports to the Committee and, indeed, described it as a "systemic problem". I am wondering whether, in your experience, then, this is an increasingly more difficult problem with a greater number of cases or whether this case is an exception?

Ms. Keil: I think this case, in the Board's mind, is problematic and has become unduly protracted because of the Board's concern with policy.

I would think, because of the volume -- and I am trying to put this as fairly as possible -- because of the volume of cases that we have had before the Board in the last fiscal year and because of the nature of the mediation process, they have gone on, in general, longer than anyone would wish; however, when the result is favourable, you tend to say: Well, the wait is justified because the case was solved fairly.

However, when the delay goes on and the resolution does not appear, you say: This is not justified because we have gone through the process and it has not worked and it is a year later and we still believe that the worker is disadvantaged.

Mr. Philip: I guess my concern is that on I do not know how many -- maybe Dr. Hill could tell me -- times, I have written to Dr. Hill in the last few months, saying not that I disagreed with the Board decision, but that I cannot get a decision out of the Board.

It is becoming increasingly frustrating, both to me, to community legal service offices around this province, and I just handed Dr. Hill another one this morning, where the CID office in Rexdale -- another one, yes, another one -- cannot get a decision out of the Board.

I guess I am asking you or maybe it would be more appropriate to ask Dr. Hill. It seems to be getting worse, not better.

Dr. Hill: I would say -- can you hear me?

Madam Chairman: Dr. Hill, can you come to the microphone?

Dr. Hill: Some months back, we set up a committee process to mediate work on these cases and I feel that that committee process was quite satisfactory and, indeed, in many ways is still quite satisfactory, but my overall view -- I have not got the statistics in front of me -- my overall view, Mr. Philip, is that the complaints about timeliness in getting a response, the complaints are increasing at an increasing rate.

That is my overall view. If you asked me to table it with statistics, I cannot say that. My feeling is, from the letters I am getting and the letters I am getting from politicians and others, that it is increasing at an increasing rate.

We are trying to bring that to the Board's attention and get back to the very successful mediation and conciliation process that I set up earlier for a quicker resolution of these matters. That is the best way I can answer that.

Madam Chairman: Yes, Ms. Keil?

Ms. Keil: I was just going to add a rider to that. As you know, the only jurisdictional complaints that we get regard Appeal Board decisions. Those have been decreasing because, of course, there is no more Appeal Board.

Administrative complaints of delay at the lower levels of adjudication have been increasing. Does that answer more fully your general question?

Mr. Philip: That was the question. I think both you and Dr. Hill answered it. Thank you.

Madam Chairman: Mr. Bell, would you resume?

Mr. Bell: Ms. Keil, with the benefit of any of this material in this part, particularly, though, the synopsis and Dr. Hill's 22(3) report, will you review the facts disclosed by your investigation, the opinions and conclusions the Ombudsman reached, his reasons therefor and finally, of course, his recommendation made to the Board, which he considers to be appropriate in the circumstances?

Ms. Keil: Thank you. Before I do that, I was wondering, with the Committee's permission, if it would prefer that I go through some of the background information on hearing loss.

I am not aware of how familiar you are and I have some information on that and, also, the context within which the hearing loss complaints were -- and I am using that in a broad sense -- hearing loss complaints were investigated at our office and out of which the criticism of the particular

policy arose because that is not in this specific report, but I thought you might find it useful.

Mr. Bell: Well, you certainly are going to have to tell the Committee about the policy itself, since it is the subject matter of your recommendation and if you believe that our review, in general terms, of your office's investigation of those matters would be helpful, by all means.

Ms. Keil: If the Committee finds that I am being too basic, please feel free to interrupt me.

About six years ago, we started to get, in our terms, a large number of hearing loss complaints and the then Assistant Director, Niki Catton, assigned it to the then investigator, myself, for a research project, so it was much broader than is usual in our cases.

We consulted with various universities and hospitals and, in fact, spoke at length with the specialist that the Board uses, itself, on almost all of the hearing loss cases in order to get what we felt was the relevant material because a number of the cases involved complaints basically about the application of policy. It is not the habit of this office to blithely criticize any government's policy without doing the necessary investigation to determine if that is reasonable.

Noise-induced hearing loss is quite often different from other forms of hearing loss in that it happens over usually a very long period of time when there is prolonged exposure to very loud noise and, according to the textbooks, what seems to happen is that the noise beats up on the high frequency levels first, so that certain sounds, not your overall hearing, but certain sounds do not come through as clearly.

In other words, vowels, for instance, are heard at low frequency levels and low frequency levels are not initially affected, but consonants such S, Sh, V, T, and Z are at the higher frequencies and they are affected early on, so, in fact, your hearing is skewed. That is, generally speaking, what happens with noise-induced hearing loss, so that when you see on the audiogram, for instance, that somebody has a 35 dB hearing loss, it is quite true that a 35 dB hearing loss is, according to the best literature, a minor handicap, but that does not mean that the person is suffering from 35 dB loss across the board.

What that usually means is that at the upper frequency levels that I have told you about, there will be a 60 or 70 dB hearing loss and at the lower frequency levels, there would be normal hearing, so that, in fact, the chart will look like a valley and that is, in effect, how the hearing

is affected.

Now, if the exposure goes on and if the hearing gets worse, it tends to level out and the frequencies that were not first affected will become more affected.

It is also the case with noise-induced hearing loss because it attacks -- I should not say "attacks" -- because it beats up on the membrane in the inner ear, it is irreversible. Certain kinds of hearing loss can be corrected through surgery. Noise-induced hearing loss is not one of those kinds, so we are, in fact, talking about a very permanent condition.

The other condition mentioned in the report is tinnitus and that is basically just a buzzing and ringing in the ear. It can disturb the equilibrium. It can be moderately to extremely vexatious, like having a bad stereo inside most of the time. That is sort of the effect of it and in conjunction with the hearing loss, it can, as you can imagine, be very troublesome.

When we studied the hearing loss complaints, it was not clear to us why the Board compensated traumatic hearing loss; that is, a sudden noise that immediately destroys part of the hearing differently than prolonged exposure because, as mentioned in the report, if you have a hearing loss of 30+ decibels in one ear and no hearing loss in the other and it is the result of trauma, you will receive a pension.

Conversely, you could have an accepted noise-induced hearing loss of 40 dB in one ear and 30 dB in the other that was related to noise exposure and not be eligible for entitlement.

The reasoning behind that was not clear to us and we had many meetings with the Board on that and it was finally agreed, back in 1983, that we were not medical experts at our office and we would refer the matter to the otolaryngologist at Mount Sinai Hospital that the Board uses and I would, just for the record, quote what he wrote back to us in 1983:

"There are many differences between pensions for trauma and chronic hearing loss and the logic for these differences has always escaped me."

A specific question, which you put to me:

"Does a person with normal hearing in one ear and a 30 dB loss in the other ear have a greater, equal or lesser handicap than a person with a hearing loss of 35 dB in one ear and 25 dB in the other?"

He has responded:

"In general terms, the person with the 35/25 dB hearing loss is the more handicapped."

We accepted that position and the Ombudsman issued a number of final reports on that subject; four of them, in fact, and in November of 1985, Dr. Elgie wrote to us on two of them and said:

"Entitlement has been granted for a permanent disability award for noise-induced hearing loss on the basis that the minimum criteria for permanent disability has been satisfied."

In February of '86, the next two cases were accepted. They were signed by the Committee to Review Appeal Board Decisions and the same reasons were given for acceptance.

Mr. Q's case came to us, as you can tell from the chronology, some time afterwards and, in fact, we proceeded initially on the assumption that it would follow the same course and so now, if I have not bored or lost everybody, I will probably go to the actual chronology of Mr. Q's case, unless there are any questions on hearing loss.

Mr. Bell: Just before you begin, you are in some difficulty bringing the other four cases in because you do not refer to that or those cases anywhere in your reports.

Ms. Keil: Yes, sir.

Mr. Bell: I know you have a position with respect to new evidence before the Committee. Having said that, I think some of those hearing loss cases were originally reported as Recommendation Denied Cases in previous Ombudsman reports and then subsequently reported as settled?

Ms. Keil: Yes.

Mr. Bell: So the Committee has got to be mindful of those for that reason.

Before you go through the facts of the particular case, so the Committee knows precisely and specifically what you are saying about this man and this policy, is it your position that the facts, if you will, or the precise nature of the hearing loss in this case is substantially identical to those in the other four wherein entitlement was granted?

Ms. Keil: Yes, sir. It is true that we do not make specific mention to the other four cases; however, in the Ombudsman's section 19(3) letter, on page 15, he does say:

"While this investigation has not been terminated and my views remain --"

Mr. Bell: Hold it, now.

Ms. Keil: I am sorry.

Mr. Bell: Just let us catch up with you.

Ms. Keil: I am sorry, sir.

Mr. Bell: Tell us where you are.

Ms. Keil: It is the third last paragraph on page 15.

Mr. Bell: All right.

Ms. Keil: "...it should be noted that my opinion on the Board policy regarding traumatic and noise-induced hearing loss is firm. I have issued several reports on this very point and, thus, that particular part of my summation cannot accurately be phrased as 'tentative'..."

Mr. Bell: That goes to his conclusions or tentative conclusions, I guess, with respect to the policy?

Ms. Keil: Yes, it does.

Mr. Bell: As opposed to the facts?

Ms. Keil: Yes.

Mr. Bell: Okay. Now, can you take the Committee through the particular facts?

Ms. Keil: Certainly.

Mr. Elliot: Might I ask one question for clarification?

Madam Chairman: Mr. Elliot?

Mr. Elliot: Could you expand on what you exactly mean by "traumatic"?

Ms. Keil: Okay. "Traumatic" is understood to be a sudden hearing loss, thus trauma. An explosion at work might cause such a hearing loss. What happens is that it is really just an intensification of the prolonged gradual exposure. It is something like some people feel after they have been to a very loud rock concert.

Mr. Elliot: That is fine, thank you.

Madam Chairman: Please continue.

Ms. Keil: Did you want me to go through it, then, sort

of piece by piece?

Mr. Bell: No. I would like you to tell us what the facts are--

Ms. Keil: Okay.

Mr. Bell: --as revealed by your investigation, what conclusions you have reached, et cetera, and why; the recommendation that was made and the analyses leading to that recommendation.

Ms. Keil: Okay. The Appeal Board decision that originally came out in 1981, concluded that Mr. Q's exposure to hazardous noise had not been established and that the degree of hearing loss was not sufficient in any case to consider the allowance of a claim; therefore, it was denied.

As noted in the reports, we originally investigated this case and with the medical evidence then on file, could not conclude that the greater hearing loss in the one ear, that hearing loss of 40 dB, could not conclude on the medical evidence that it was related to work and, thus, the Ombudsman did not initially support the complaint.

In the interim, a new report was submitted from another otolaryngologist and the Board was asked to reconsider. The new report said that the discrepancy in the hearing loss was readily accounted for by the fact that Mr. Q had spent a lot of time working on the saws, where the decibel level is very high and the one ear being closer to it than the other would account for the discrepancy.

The Appeal Board received that information and in its decision of October 28, 1985, concluded that the submissions would not cause it to vary, amend or revoke its earlier decision or grant to a new hearing.

Mr. Bell: Can we go back to the basics?

Ms. Keil: Yes, sir.

Mr. Bell: I think we are going to have to lay some basic facts before the Committee, so that they have an appreciation of what significance, if any, that that report has or does not have.

Ms. Keil: Okay.

Mr. Bell: First of all, as your synopsis indicates, the gentleman worked as a bricklayer between the years '74 through '80?

Ms. Keil: Yes.

Mr. Bell: Is that correct?

Ms. Keil: Yes, it is.

Mr. Bell: In respect of that work, there was a number of machines, et cetera, that emanated a noise, which in accordance with certain union findings, exceeded certain minimal safety levels; is that correct?

Ms. Keil: Yes.

Mr. Bell: What was that machinery and what was his proximity to it?

Ms. Keil: Mr. Q worked as a bricklayer in the battery shed. I am sorry, I should go back and give some background.

The minimum regulations under law state that eight-hour exposure to 90 dB is continuous exposure. 90 dB is the cutoff and then it decreases. You can have four hours' exposure to 100 dB and so forth and so on, down to a point where or up to a point, rather, where you can have no exposure.

There are two points here: Mr. Q worked 10-hour shifts, so he was working over the eight hours. He was exposed to noise from a blast furnace of 100 dB, worked around steam valves with noise levels in the area of 130 dB and was exposed to noise of masonry saws and diamond blades, where the noise level had been measured at 110 dB and it was also stated that he had been exposed to noise levels of 95 dB around plastic air guns, popping things in --

Mr. McLean: Just a point of order, Madam Chairman.

Madam Chairman: Yes, Mr. McLean?

Mr. McLean: The information she is giving you is on page 2 and 3. It is all in there.

Ms. Keil: Oh, yes. In the workplace, he would have been immediately exposed to those noise levels.

Mr. Bell: You used the words, "would have." Does your investigation reveal that he was immediately exposed?

Ms. Keil: Our best evidence indicates that he was, by which I mean that the evidence supplied by the union representative was not contradicted by anybody else, although at one point in the investigation, and I should say this is the Board's investigation, one of the employers argued that he could provide information to show that Mr. Q was not exposed to these noise levels. He never did so.

Mr. Bell: What did Mr. Q say to you as far as your investigation?

Ms. Keil: He said it was really noisy.

Mr. Bell: And he was close to it?

Ms. Keil: And he was always in the midst of it.

Mr. Bell: All right. Your documents indicate that in 1979, he first saw a hearing specialist?

Ms. Keil: Yes.

Mr. Bell: In respect of problems he was experiencing at that time?

Ms. Keil: Yes.

Mr. Bell: Tell us about that.

Ms. Keil: Okay. He saw an otolaryngologist, which is the ear, nose, eye and throat folks, who felt that the worker's hearing loss was consistent with noise exposure, but he also -- which means that it follows that dip that I told you about earlier, so it has the configuration of hearing loss, of noise-induced hearing loss -- but that this did not account for the definite difference in the two ears.

In this respect, it should be noted that asymmetrical hearing loss from noise exposure is not common, which is why when you see it, you tend to comment on it.

It should also be noted because this was probably one of the problems in communication of the history, is that Mr. Q's English is very limited and the majority of specialists whom he saw spoke English, so there is no evidence that a complete work history was obtained and I mention that in light of the evidence that was later presented by the specialist, who explained about the saws.

Mr. Bell: Well, there is no evidence that it was not obtained either, is there?

Ms. Keil: No.

Mr. Bell: Now, the examination in 1979, what conclusions did the specialist come to in respect of the hearing loss?

Ms. Keil: What one would assume from his report is that the hearing loss was consistent with noise exposure, but he could not account for the difference in the two ears.

Mr. Bell: Specifically, there was a 40 dB loss in the

left ear?

Ms. Keil: Yes.

Mr. Bell: A 20 dB loss in the right ear?

Ms. Keil: Yes.

Mr. Bell: What does he attribute the loss to?

Ms. Keil: He attributes it to noise with a caveat about the difference.

Mr. Bell: Okay, all right.

Ms. Keil: Mr. Q then saw an audiologist in January and June of 1980, with similar findings reported.

Mr. Bell: Meaning the 40 dB --

Ms. Keil: 40 dB loss in the left and the 20 in the right.

Mr. Bell: What does the audiologist attribute the loss to?

Ms. Keil: If I can just refer specifically to his reports. He does not comment on the reasons. He merely --

Mr. Bell: The similar findings you refer to in Paragraph 3 of the synopsis refer only to the decibel level?

Ms. Keil: That is right.

Mr. Bell: All right. Then you note that a claim was filed with the Board in the fall of 1980. We have already talked about the decibel readings that were reported or supplied by the union.

Ms. Keil: Um-hmm (affirmative).

Mr. Bell: Paragraph No. 5, I take it, it means that the employer has never come forward with any decibel readings to contradict those decibel reading?

Ms. Keil: Yes, it does. That is right.

Mr. Bell: Now, obviously, because we are here, the Ombudsman examined the hearing loss -- no.

I think now you had better go back to that subsequent opinion given by the specialist who is used frequently by the Board.

Ms. Keil: Okay. When Mr. Q came to us the second time

with the new Appeal Board decision and the rather extensive report from the otolaryngologist, who commented that the discrepancy in hearing loss could readily be accounted for by the kind of work he did and how that would happen, in the course of the investigation, we were then confronted with a divergence of medical opinion.

Some of the otolaryngologists did not think that the discrepancy could be accounted for by noise exposure. The last specialist did for the reasons given.

It seemed appropriate at that point to send all of the material to the otolaryngologist at Mount Sinai, who the Board uses -- sorry.

Mr. Bell: Let me stop you. Up to November 1985, when the Ombudsman was asked to investigate the 1985 Appeal Board decision on the reconsideration or a refusal to reconsider, am I correct that the Ombudsman had concluded in respect of the two issues that are relevant to this action that (a) there was not a causal connection established between the hearing loss and the noise conditions at work?

Ms. Keil: No, no. I am sorry. In his first report, the Ombudsman merely accepted the majority of medical evidence that only the lesser amount of hearing loss could be attributed to the noise and, therefore, the lesser amount, being 20 dB, was clearly below any of the criteria for entitlement.

Mr. Bell: So he accepted 20/20?

Ms. Keil: Yes. And then there was the new report--

Mr. Bell: And?

Ms. Keil: --which the Board declined to vary its decision on and then it came back.

Mr. Bell: Are we correct, though, that in the Ombudsman's first report, which we do not have here -- I presume you mean the reporting letter to the complainant -- that there were not any conclusions or criticisms made of the policy at that time?

Ms. Keil: No, because the asymmetrical loss would not have been a consideration in that the doctors were arguing that the extra loss would not have been noise-induced or that they could not account for it so that, in effect, the noise-induced loss became bilateral and there was this unknown component; okay?

Mr. Bell: Well, tell us about this 1986 opinion, which you described in Paragraph 13 of the synopsis.

Ms. Keil: We sent, as stated, all of the medical reports, levels of exposure and employment history to this doctor and asked him for his comments and, in fact, he wrote back and requested more information before he gave us a final opinion.

In his opinion of April 30, 1986 he, in fact, concluded that he would accept that the total hearing loss in both ears was due to noise exposure and that the tinnitus was a factor aggravated by the noise. I can read directly from his report:

"I have, in fact, evaluated the question of asymmetry of hearing loss in noise-exposed workers. There certainly are some occupations where noise exposure does produce an asymmetrical loss. They include people who shoot regularly, where the ear closest to the muzzle of the gun frequently shows a greater hearing loss than the ear which is protected. They also include some hard rock minors."

He says:

"Unfortunately, not all asymmetric losses in the noise-exposed population are due to noise exposure, however --"

He goes on to accept that, in this case, he would accept that all of the hearing loss:

"On the balance of the information that you have produced for me, I personally would accept that the total hearing loss in both ears is due to noise exposure and the tinnitus is an aggravated factor by the noise."

That was his conclusion.

Mr. Bell: What you have just read is not in your report, is it?

Ms. Keil: No, no. I have quoted directly from the letter.

Mr. Bell: Does that fairly describe, then, the Ombudsman's investigation and the facts revealed thereby?

Ms. Keil: Yes, it does.

Mr. Bell: Will you explain, then, to the Committee what the Ombudsman's conclusion is in this case and the reasons therefor?

Ms. Keil: Okay. The Appeal Board found two, three things, actually. The Appeal Board found that there was not sufficient evidence to conclude that there was sufficient

noise exposure at work to have caused the hearing loss.

Further, it found that there was not sufficient hearing loss and, thirdly, because tinnitus is a boot strap issue, if you will, because of the first two, therefore, tinnitus was not accepted.

The Ombudsman, first in his 19(3) and then in his 22(3), concluded that the best evidence indicated that there was sufficient noise exposure in the workplace to have caused the hearing loss; secondly, that on the best medical evidence, we would accept that all of his hearing loss was noise-related and, as a corollary to that, that he should be granted -- that it was unreasonable, rather, to refuse entitlement; and, thirdly, that as all of the medical evidence which addresses the issue says that the tinnitus has been aggravated by the work environment, that it was unreasonable to deny entitlement for the tinnitus.

Now, the one of these that is the most contentious is that it was unreasonable to deny entitlement, to deny allowance of the claim because that is where you get to policy.

The Board policy states that a bilateral hearing loss that is noise-induced has to be 25 dB for a basic allowance; that means health care, hearing aids, that sort of thing and 35 dB bilaterally for a pension.

Mr. Bell: Just a little explanation.

Ms. Keil: Yes?

Mr. Bell: How do you compute a 25 dB bilateral hearing loss? Does it mean there has to be no less than 25 dB loss in both ears?

Ms. Keil: Yes, it does.

Mr. Bell: The calculation is not a cumulative thing, like adding 20 and 40 together or averaging it to get 30?

Ms. Keil: No. When you do the audiogram, you test both ears and you do the calculations for each ear separately, so that the loss in each ear is calculated and then you have a 25/25 dB loss.

Mr. Bell: Okay. And...

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Yes. I have a question of clarification. When you mention entitlement about Mr. Q's case, do you make particular reference to benefits or to pension?

Ms. Keil: Both.

Mr. Lupusella: Both?

Ms. Keil: The entitlement starts at 25 dB bilaterally. That does not entitle you to a pension. It entitles you to a hearing aid or any other sort of health care that you might need, doctors, whatever. At 35 dB bilaterally, the pension kicks in.

Mr. Lupusella: What about weekly benefits, which are part, also, of the entitlement process of benefits? Are you claiming something in relation to that?

Ms. Keil: The general practice for a 35 dB hearing loss would only give you a one per cent pension, so you would just get it commuted in a lump sum. It would not be weekly.

Mr. Lupusella: So in this particular case, we are not mentioning weekly benefits, which the worker --

Ms. Keil: No. You would be talking about a lump sum payment.

Mr. Lupusella: So we are talking about pension and the entitlement to hearing aids and so on?

Ms. Keil: Yes.

Mr. Lupusella: Okay, thank you.

Mr. Bell: For further clarification, this gentleman is not receiving any benefit of any description in respect of the hearing loss now?

Ms. Keil: Or for the tinnitus.

Mr. Bell: Let us just stick with the hearing loss for the moment.

Ms. Keil: All right. No, he is not.

Mr. Bell: The current Board policy that you referred to in Paragraph 2 of page 4 under the analysis indicates that if you have got a +30 dB loss in one ear and no loss in the other ear, you will get one per cent pension?

Ms. Keil: Yes.

Mr. Bell: Do you get a one per cent pension if you have got a +30 loss in one ear, but less than 25 per cent in the other ear?

Ms. Keil: If you are talking about traumatic hearing

loss, the Board will give you a one per cent pension for a 30+ decibel loss in one ear and absolutely no loss in the other.

Mr. Bell: Let us look at the facts of this case. If it is determined that this gentleman suffered, as defined, a traumatic hearing loss, he would then become eligible at least for this one per cent?

Ms. Keil: If Mr. Q had a traumatic hearing loss, he would be eligible for a two per cent pension because it grades up.

Mr. Bell: All right, okay.

Ms. Keil: That was, in fact, the substance of our argument, that the same hearing loss is present irrespective of whether it is traumatic or long-term. The same disability is present, whether it is traumatic or long-term and, in fact, there is an additional loss present because he does not have normal hearing in the other ear. It is not a great loss, but it is there.

Mr. Bell: Well, why is it unreasonable for the Board to have denied this gentleman's claim for benefits?

Ms. Keil: Why is it unreasonable?

Mr. Bell: Yes.

Mr. Keil: Because if he were suffering from traumatic loss, he would have gotten the pension and the Ombudsman concluded that that was inequitable to grant entitlement for the same disability in one case and not in the other, just based on how quickly you got the hearing loss.

Mr. Bell: Can I just do one more for clarification? Now, what you are saying is that under the heading of "traumatic loss", this gentleman's current hearing loss factor would grant entitlement?

Ms. Keil: Absolutely.

Mr. Bell: However, he is under another heading?

Ms. Keil: That is right.

Mr. Bell: Noise-induced over a period of time?

Ms. Keil: Um-hmm (affirmative).

Mr. Bell: And those same loss ratings do not entitle him?

Ms. Keil: That is right.

Mr. Bell: It is the differentiation that you find or the Ombudsman has found to be unreasonable in the circumstances?

Ms. Keil: Yes.

Madam Chairman: Mr. McLean?

Mr. McLean: What is the age of Mr. Q?

Ms. Keil: Mr. Q is in his 50's.

Mr. McLean: What amount of loss entitlement would he be allowed under the recommendation?

Ms. Keil: What would be the total that he would get?

Mr. McLean: Yes?

Ms. Keil: He would get best calculations from the current rating schedule. He would get two per cent for the loss in the left ear. He would get a two per cent award to tinnitus. It would probably be \$8,000, if it were commuted.

Mr. McLean: Back until when?

Ms. Keil: Back until he filed his claim.

Mr. McLean: That would be?

Ms. Keil: '80.

Mr. McLean: 1980?

Ms. Keil: Or '79, sorry.

Mr. McLean: He would get a lump sum?

Ms. Keil: And that would be it.

Mr. McLean: And that would be it?

Ms. Keil: Yes.

Mr. McLean: Would he be allowed anything yearly for hearing aids or that type of -- doctors' check-ups and that?

Ms. Keil: He would be allowed, if a hearing aid were deemed appropriate, he would be granted that and the medical, as well, yes.

Mr. McLean: Well, if the Board's policy and the Board's criteria, this does not fall under their criteria, how would they justify paying it, if they have no criteria for it to

fall into?

Ms. Keil: That is a very good question and my answer to that would be based on what was done in the previous cases and what, in fact, the rating schedule says, is the rating schedule has two categories; one is partial hearing loss, where both ears are affected and it, then, has another category where it says: "Partial hearing loss, one ear only."

The rating schedule, which is the policy referred to in the Legislation that I think it is -- and it goes to your question -- section 45(3):

"The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations that may be used as a guide in determining the compensation payable in permanent disability cases."

This rating schedule says, "...partial hearing loss one ear only." It does not say for trauma.

It is the Board's practice to read that as applying to trauma, but it is not in the policy that they must; in other words, they could and in the past four cases, did grant entitlement on that basis.

Mr. McLean: In other words, if this Committee deems they have to recommend or to accept the Ombudsman's conclusion or recommendation, the Board could sit on it for another five years and still not do anything because they could say: It does not fit into our criteria, so therefore we do not accept the report or the recommendation from the Committee.

Quite obviously, he has already gone through the procedures. He wrote to the Premier, he has done everything and the Board is still saying: We are not doing it.

What is the next step? They could still sit on it.

Ms. Keil: If you are asking me if the policy allows them to pay, it is the Ombudsman's opinion, based on the letters we have received from Dr. Elgie stating that they can do that, that the policy does not preclude them paying Mr. Q.

Mr. McLean: Thank you.

Mr. Bell: I think, in fairness to the Board, that certainly during the tenure of the current Chairman and the previous Chairman, that where this Committee has made a recommendation that the Board implement an Ombudsman's recommendation, they are pretty darn good and reasonably

quick in doing it and unless the Board representatives advise us today that there has been a change in thinking along those lines, that the Committee is entitled to presume that it is going to be done in the same way.

May we talk about these four cases for a minute?

Ms. Keil: Yes.

Mr. Bell: Are you saying that in any or all of those cases, the Board ultimately accepted your recommendation to provide the individual with benefits where they had a bilateral hearing loss of less than 25 dB and there was no finding of traumatic hearing loss?

Ms. Keil: In all four cases, they accepted entitlement for asymmetrical hearing loss, where one of the ears was -- you do not get a pension unless it is a noise-induced hearing loss, unless it is 35 dB bilaterally.

In all four cases, one of the ears was below 35 dB and one ear was at 35 or above.

Mr. Bell: Well, how is that the same as this case? We are dealing with bilateral hearing loss here that heretofore was not traumatic?

Ms. Keil: Right. Maybe it would be helpful if I just went through. In the other four cases, we were talking about a 35/30 and a 35/25.

In none of the cases did the worker actually have as great a hearing loss as 40 dB, but there was an asymmetrical loss, which under the policy or under bilateral and even entitlement, even loss would not have entitled the worker to a pension.

Mr. Bell: But in all of those cases, there was a hearing loss of at least 25 dB?

Ms. Keil: In both ears.

Mr. Bell: In both ears?

Ms. Keil: Yes.

Mr. Bell: So it fit within the policy?

Ms. Keil: (Nodding negatively.)

Mr. Bell: No?

Ms. Keil: No.

Mr. Bell: Well, I do not understand why it did not,

reading how you have summarized the current policy of 25 dB minimum for a bilateral loss.

Ms. Keil: I am sorry. I see why I am not clear. They accepted entitlement for a pension and in those four cases, none of the workers had a 35 dB bilateral hearing loss, which is their cutoff for a pension.

Mr. Bell: All right, okay.

Ms. Keil: In their letter, they said, -- I am sorry. If I can extrapolate from that, when they accepted, what they were saying was that the noise loss in the one ear, which was over 35 dB, was sufficient to fit within the policy of partial hearing loss, one ear only for entitlement because otherwise, irrespective of having achieved 25 dB, you would not be eligible for a pension.

Mr. Bell: I thought you were telling us about those other four, that the Board ultimately decided to compensate those people, notwithstanding that there was a policy that did not fit and that does not appear to be the case because what the Board did was move from Policy A and fit it into Policy B?

Ms. Keil: Well, I feel that the Board did not say that it did that, but what the Board said was that on the basis that the minimum criteria for permanent disability has been satisfied and the only way that you can meet the minimum criteria for a permanent disability, where one ear is below 30 dB, is go to the partial hearing loss and only count the worst ear.

That is the only way that you can fit it and so I assumed that that is what the Board had done and the calculations that they sent to our office substantiated that.

Mr. Bell: You say that represents an unusual treatment by the Board of its policies in respect of hearing loss?

Ms. Keil: Yes. I think that it was a treatment in order to --

Mr. Bell: Satisfy the result?

Ms. Keil: Yes.

Mr. Bell: You say that based on that principle, the Board's ability and willingness in the past to flexibly apply and interpret its policies in this way, that this is a similar case for such a treatment?

Ms. Keil: Yes. Ultimately, we believe and the Ombudsman has commented that the policy distinction is

unfair and should be fixed.

Mr. Bell: But that is not part of your recommendation?

Ms. Keil: No.

Mr. Bell: We understand that the cap or the dollar value of the recommendation is approximately \$8,000?

Ms. Keil: Yes.

Mr. Bell: I want the Board to have really the first opportunity of speaking to the next matter, but I just want to ask you a few questions.

I understand your meeting last week, you were informed of and given particulars on a new policy the Board is considering, which would apply to this particular case?

Ms. Keil: We were not given particulars because they have not formulated the new policy.

Mr. Bell: Then you are not able to tell me whether any policy that is being considered would entitle this individual to benefits?

Ms. Keil: It might, but it might not.

Mr. Bell: You do not know?

Ms. Keil: Yes. I am sorry, I do not know.

Mr. Bell: Is there anything else you want to add to assist the Committee in understanding the matters in the report and the material before Members of the Committee ask you any questions they may have?

Ms. Keil: I guess the only thing in conclusion would be that the Ombudsman is not indifferent to the submission by the Board that it is going to change its hearing loss policy and, in fact, the Ombudsman thinks that is a good thing, but it does not seem to us that the facts of the case, as they existed in 1985, and 1986-1987, can be swayed by a policy that may come into effect now or it may not, when we have over the years been told that a new policy is coming.

The Ombudsman does not feel that Mr. Q's case should be delayed, even on the hopeful assumption that a new policy is going to emerge because the case was decided on the policy and the Legislation as it stood.

Mr. Bell: Madam Chairman, Members of the Committee may have some questions of Ms. Keil and/or Dr. Hill before the Board is asked to make submissions.

Madam Chairman: Mr. McLean?

Mr. McLean: Thank you, Madam Chairman.

The professional doctors that made the reports, do you have documentation in writing from the doctors, indicating that they do accept that there is sufficient noise to cause the hearing loss?

Ms. Keil: Yes.

Mr. McLean: How many reports? Out of that, would you have one or two doctors? I understand there was the Board's doctor recommended there?

Ms. Keil: As a matter of fact, the Board's doctor, in a memo, did state that the hearing loss was compatible with noise-induced.

Mr. McLean: Compatible? Do you have any letters that indicate very straightforwardly that, yes, the hearing loss is caused from noise at work?

Ms. Keil: Yes.

Mr. McLean: From any doctors?

Ms. Keil: Yes, from doctors, from the doctor at Mount Sinai and from the otolaryngologist's report, which was the basis for the request for reconsideration, quite specific.

Mr. McLean: Thank you.

Madam Chairman: Any questions? When the doctor examined Mr. Q in April 30, 1986, and he concluded that the total hearing loss in both ears was due to noise exposure, at that time of his investigation, was Mr. Q's hearing still 40 dB lost in one ear and 20 in the other or had he deteriorated?

Ms. Keil: I should state that the otolaryngologist did not see Mr. Q in person. He reviewed all of the reports, the medical reports and gave his opinion.

It is probably true that if you were to recommend that entitlement be granted and if the Board were to accept this, they would then send him probably to this very same doctor for a determination of exact disability; however, it is also the case that Mr. Q has moved out of the work, the noisy work environment, and once you do that, your hearing does not further -- help me out here. What is the word I am looking for -- does not further deteriorate, once you are out of the work environment, so it would be presumed to be the same. Is that...

Mr. Bell: From all of the material that you have reviewed and investigated in the Board's file or anywhere else, is there any opinion expressed, medical or otherwise, attributing the additional 20 per cent -- I am sorry -- the additional 20 dB hearing loss in the one ear to something other than exposure to noise in the work force?

Ms. Keil: No. The strongest statement is from the two early otolaryngologists, that they cannot account for it. They do not attribute it to anything else.

Mr. Bell: You told us that at one point, the employer or employers disputed that there was either noise or proximity thereto. Did they give specific evidence to contradict or was it merely an expression of a position?

Ms. Keil: Expression of a position.

Mr. Bell: Is there any explanation for the additional 20 dB loss offered by any Board representatives, as contained in the file or made available to you otherwise?

Ms. Keil: No, there is not.

Mr. Bell: Okay.

Madam Chairman: The basis of your supporting Mr. Q's case, that it fits within or could fit within the policy of the Workers' Compensation Board is that you had these four previous cases, where it became generally accepted through those four cases that this policy could be adopted to give a pension to other recipients or other people who had had a hearing loss?

Ms. Keil: That was the basis for our thinking that this one probably would be accepted. It was not the basis for the support, originally.

The support really hinges very fundamentally on the Ombudsman's belief, supported by the otolaryngologist, that it is not rational to compensate hearing loss differently, depending on whether it is traumatic or noise-induced, that it would be fair and equitable to compensate them in a similar matter and that is the basis for support.

We assumed, because the other cases had been settled on that premise, that this one would be as well.

Madam Chairman: The difficulty we have is those other four cases are being brought in and yet we do not really have a basis of knowing what the determining policies are on those, so that was my concern.

Just, in another sense, back to these four cases. When were they decided, the period or time frame when these four

were brought and adjudicated between or mediation occurred between the Ombudsman and the Board?

Ms. Keil: In those cases, the reports were issued, three of them in the summer of '84, and the fourth in the summer of '85. Acceptance was granted either in the fall, November of '85, or in February of '86.

Madam Chairman: When you were in discussions with the Board, I presume that these four cases were discussed and compared with the present case before us?

Ms. Keil: Heavily touted.

Madam Chairman: What was the differentiation made, and I will ask the Board when they come up, but in your opinion, what was the differentiation between these four cases and the present case before us today that did not permit them to make a decision, if you are able to say?

Ms. Keil: The Board never suggested to us that there was a difference in the cases. They have suggested that it was a difference in their approach and I would be more comfortable letting the Board explain that.

Madam Chairman: Thank you. Any other questions? Did you have a question? Any other questions, Mr. Lupusella?

Mr. Lupusella: Just a simple question: Why did you choose to refer Mr. Q to the same specialist used by the Board? Was there any particular reason involved?

Ms. Keil: Well, there were two; one was a tactical reason in that if you want a body to pay close attention to your medical opinion, it does not hurt to send it to somebody that you both respect and, two, he is pre-eminent in the field. He reviews 600 cases a year.

We wanted his very expert opinion on asymmetrical versus bilateral hearing loss and, in fact, he seemed ideal. He is also prompt and he charges reasonably.

Mr. Lupusella: Thank you.

Madam Chairman: No further -- Mr. Henderson?

Mr. Henderson: I am just trying to understand, the assumption -- perhaps I should ask the Board this, too, but the idea seems to be that losing 20 dB in one ear and 40 in the other, which combines to 60, although I do not know if it makes sense to add them up, is a lesser loss than losing 25 on each side, which totals 50. That puzzles me.

Ms. Keil: No. You should not total them because it is a separate -- but the Board's position would be that a 30 dB

loss in one ear by trauma would be worse than a 35 dB loss in both ears, would be a noise-induced, and the specialist does not concur with that nor do we.

Mr. Henderson: Just -- well, okay.

Madam Chairman: Any further questions? No? Mr. Bell?

Mr. Bell: Mr. Glasberg, you have been sitting patiently, listening for the past hour or so. I know you wish to make, in a preliminary way, a brief opening on behalf of your colleagues.

Perhaps before doing that, you could introduce to the Committee and for the record, representatives of the Board who are here, perhaps to assist you, as required today. Then, when you give your opening submissions, before we get into the particulars of this case, I would just like to ask you a couple of preliminary matters. Proceed.

Mr. Glasberg: That is fine. My name is Irwin Glasberg. I am the Executive Director of the Board's Review Services Department. This is the internal appeal area of the Board.

I am a member of the Committee to Review Appeal Board Decisions, which deals with the cases that are brought to our attention by the Ombudsman and then provides advice to the Chairman on their disposition.

I have brought with me three other Members of the Committee, who I will introduce to you. The tall gentleman is Mr. David Queen, who is our present Ombudsman Administrator.

The chap next to him is Mr. John Boyd, who was the former Ombudsman Administrator and has gone on to bigger and better things at the Board.

Next, there is Mr. Peter Walker, who is the Director of the Board's Decision Review Branch and, finally, Mr. Joe Nemet, who is presently on secondment as a Manager in the Hearings Branch. He is the representative of our General Counsel's office on the Committee.

Mr. Bell: Thanks. Do you have something to say, for opening?

Mr. Glasberg: I just have some very brief comments. Madam Chairman, on behalf of Dr. Elgie, I would like to thank the Committee for giving the Ontario Workers' Compensation Board the opportunity to put forward its submissions with respect to the four cases, which the Ombudsman has brought before you.

As some of you are aware, this will be the Board's first

appearance before the Standing Committee since 1985. In the last two years, the Board and the Ombudsman's Office have been able to agree on the disposition of all cases which the Ombudsman has put forward. In large part, the excellent working relationship between the two organizations was replicated in the most recent period.

According to the statistics provided by the Ombudsman, in the 1986-87 fiscal year, the Ombudsman's Office received 352 complaints against the Workers' Compensation Board. This statistic should be placed in the context of the roughly 400,000 lost-time claims, which the Board processes on an annual basis.

According to the annual report of these complaints, 104 were discontinued and 97 were found to be unsubstantiated. The Ombudsman was able to support the complaints of applicants in 91 cases.

I believe there were originally 16 cases which were to come before this Committee, but due to the diligent efforts of staff in both of our offices, some compromises were struck and as a result, there are only four cases which you have to consider and I think you will appreciate, after hearing the facts and the arguments, that these are extremely complicated cases for a variety of reasons.

Three of the decisions involving Mr. E, Mr. U, and Mr. X, respectively, address the complex topics of medical and legal causation. The underlying issues raised in these decisions may be summarized as follows: How much proof is required for a claim to be allowed under the Worker's Compensation Act?

The Board will take the position in each of these cases that the evidence put forward by the Ombudsman is either inadequate or lacking sufficient quality or particularity to establish causation.

A key theme in our presentation will be that the determination of causation must be an exercise founded on common sense principles. Many factors will be relevant, including medical evidence, the proper sequence of events, and credibility.

At the end of the day, however, the main question to ask is whether, on a balance of probabilities, it was a work place incident or exposure, rather than some other factor or predisposition which caused the incident. If this is not the case, then the law does not permit the Board to grant compensation, except where the evidence is evenly balanced for and against the worker.

The fourth case before the Committee, involving Mr. Q, raises the complex issue of how an Ombudsman's complaint

should be treated when the subject matter of the dispute coincidentally forms part of an ongoing WCB policy review, whose results will be known shortly.

The Board will take the position that, for reason of fairness and consistency, it would be appropriate for the disposition of the case to await the findings of the policy review.

Finally, I would like to point out that with the establishment of the Workers' Compensation Appeals Tribunal, which is now the final appellate level within the compensation system, the involvement of the Ombudsman with respect to Appeal Board decisions will decrease dramatically. The only cases which will remain subject to the Ombudsman's scrutiny are those heard by the defunct Appeal Board prior to 1985, and I just have one further point to make.

In addition to the gentlemen, who I have introduced today, the Board will be bringing for this afternoon and for tomorrow, the senior review medical consultant within the Review Services Department. This individual will be available to answer any general questions which you might have regarding the process of disease or medical points, in general.

It has been agreed that Dr. McFarlane will not be answering any questions pertaining to the individual facts of the case, but just provide some general information for you, if you so desire.

Mr. Bell: Well, specifically, though, whether it has been agreed or not, just for the Committee, to assist you, this has happened in the past, where the Board has brought a duly qualified medical practitioner with its representatives.

There has been concern expressed in the past by both the Ombudsman and Committee Members that the Committee not involve itself with so-called new evidence given by the witness to the Committee, taking the Ombudsman by surprise and also the Committee, and I believe that has been part of the discussion between the parties as well.

I commend that as the conditions upon which Dr. McFarlane will be invited and permitted to attend. Specifically, if there is any anything arising out of the material, which any of the Members of the Committee would like some clarification on, definitions, et cetera, Dr. McFarlane is certainly there to assist. He is not there, however, to put a fresh coat on a position or on somebody else's opinion.

Mr. Glasberg, just to assist you, and I know this is

your first time before the Committee in the capacity which you now are holding, and for Members of the Committee, let me give you some chronology.

In cases where at the time the matter gets to you there has been no position or response received, in written or in any other form, representing the Ombudsman's recommendation and report, the Committee has said in the past that sometimes by recommendation, sometimes specifically by recommendation to the Workers' Compensation Board and its predecessor, before you get to the Committee, you do your work with the Ombudsman's Office and you do it in clear, written form, so that there is no misunderstanding what the other's position is and by the time you get to the Committee, there is no doubt who is relying on what and who will or will not do what.

The Committee has come close in the past to saying: Where a governmental organization comes before it, not having done or completed that process, the Committee will not hear from them. The Committee will take only one piece of evidence, and that is the Ombudsman's report, without a response.

If there is no response, the Committee probably only has one way to go, although it can exercise its own independent decretion, if it totally disagrees with what the Ombudsman has done, said or recommended.

I remind again, Members of the Committee, as recently as your Argosy report, there was a -- I will use the word, there was a literal dumping of 500 pages of new documentary material -- Mr. McLean will remember quite well. I wish I could, as well, because I was not here -- on the Committee and the Ombudsman, literally as the hearing was started.

It was resolved in an amicable way, pursuant to a fairly generous position taken by the Ombudsman, but the Committee had some things to say about it in its Argosy report under a procedural addendum at page 18 of that material, wherein it said: As a general rule, at that late stage of the game, new documentary evidence will not be permitted and I would venture to say the intent of that ruling is that no new evidence of any form will be permitted.

With that background, Mr. Glasberg, may I ask you rhetorically, why should the Committee hear from the Board at all?

Mr. Glasberg: Well, I guess I would perhaps respond in the same fashion and indicate that it is the responsibility of this Committee to weigh carefully all of the facts in the competing arguments to make an appropriate decision.

I want to perhaps dispel a misapprehension in the sense

that the Board is in any way trying to surprise either the Ombudsman or the Committee.

While perhaps we may have been remiss in not sending out as many written responses or follow-ups as we might, there has been an ongoing discussion between representatives of our office and the Ombudsman and the fact that we have managed to resolve all but four of the hundreds of cases which have come before us, must suggest that something is very right with the process.

Most of the discussions have taken place on an informal basis and I believe there has been a very frank and intelligent sharing of information.

The point about new ideas being brought to bear on these four cases very soon before the Committee meeting has some legitimacy. Part of that has occurred because three of the present Members of the Committee to Review Ombudsman Decisions were recently appointed and all of us had the opportunity, really for the first time several months ago, to go over these cases and some new ideas came to light, which caused us to undertake further medical inquiries in some cases and that is unfortunate.

I think that also as we proceeded through the settlement of these disputes, other points came to bear and we felt it was important for us to share our ideas with the Ombudsman on the assumption that either that Office might reconsider its initial position or we might be persuaded of new arguments that the Ombudsman might have.

Mr. Bell: Let me ask you a couple of specific matters. You are familiar with the Ombudsman's so-called 19(3) letter, which is dated June the 19, 1986, in respect of the Q complaint? You are nodding "yes"?

Mr. Glasberg: Yes.

Mr. Bell: We know there has never been any written response received by the Ombudsman, notwithstanding that he seeks such, not only sought it in that letter, but he sought it in subsequent telephone calls.

What is the Board's explanation for the failure to respond to that letter, as requested?

Mr. Glasberg: I would like to ask Mr. John Boyd, who was the Ombudsman Administrator, to deal with that question specifically because he has got the relevant knowledge.

I should indicate that in respect of that case, the Board's position has been historically that Mr. Q was not entitled to compensation because he did not set out, he did not meet the compensation criteria set out in the Board's

Hearing Loss Policy and I do not believe that the Ombudsman's Office would have been surprised at that position at any stage in the process.

Your point about the Board needing to be a little more pro-active in ensuring that written responses go out is well taken, and one thing I will do after the Committee sessions is ensure that our follow-up system is in place and that we do have procedures to ensure that letters go out more quickly.

Having said that, I would like to bring Mr. Boyd up to answer any specific questions you would have about communications in the relevant period of time.

Mr. Bell: Is Mr. Boyd the more suitable person to speak to the reasons for no response to the 22(3) report as well?

Mr. Glasberg: Yes.

Mr. Bell: Madam Chairman, with your permission, I think it is appropriate, Members, to tell you where I am going. I think there needs to be some consideration, discussion on your part as to whether the Board, in the circumstances, is to be permitted to make submissions.

I do not mind telegraphing where I am going to go. I think, in the circumstances, because of the explanations made to date and probably anticipating some other explanations, the Board should be permitted to make some submissions, but I would ask you to be mindful of the timing of the submissions and also be mindful of anything that comes forward that is new.

Having said that, Mr. Boyd, if you could come forward?

Mr. Boyd: Thank you. Good morning, Madam Chairman, gentlemen, ladies. My name is John Boyd. I am the former Ombudsman Administrator with the Ontario Workers' Compensation Board.

I do not intend to take up too much of your time explaining the procedural process in dealing with the Ombudsman submissions but, briefly, when the Appeal Board was disbanded in October of 1985, we identified earlier that it would be essential to implement a new approach to Ombudsman's submissions; therefore, from January of 1986, we did establish regular meetings with our colleagues at the Ombudsman's Office and this could be at either the 19(3) stage, where the Ombudsman had arrived at a possible conclusion or possible recommendation and we would endeavor to resolve the issue at that stage on an informal basis.

Statistically, I can assure you that we did achieve success in the majority of cases and because, at that point

in our history, we also had a significant volume problem before us in terms of backlog, the previous custom of responding in writing at 19(3) stage, it was dispensed with, but not unilaterally.

It was an understanding, not a formal agreement between the Ombudsman's Office and the Board, that, indeed, we do not have to respond at the 19(3) level because, in many instances, the issue was resolved at that point and, therefore, appropriate action would be taken to implement the possible recommendation that had been arrived at, but where we were unable to reach agreement at that stage, we then did proceed into the final stage, the 22(3) stage.

At the same time, I believe it is accurate to convey to the Committee that we were not remiss in failing to respond to each and every 19(3) which came to the Board.

We did, in fact, formally respond and I would estimate, and I cannot attest to this now in terms of numbers, that we probably did in terms of at least 16 per cent of the cases and normally in a reasonably timely fashion.

We were not insensitive to the worker's needs and the worker's concerns with respect to the complaint. We knew it to be, in many instances, a protracted issue, and of the cases before you, there are but two where we did not provide the written response and that was in no small measure due to the fact that we did have ongoing dialogue until as recently as one week ago and at that point a firm definitive position had not been formed, but we were still attempting to resolve the issues presented and I am prepared to answer any questions you may have.

Mr. Bell: Mr. Boyd, those comments appear to apply to the explanation why no response was received for the 19(3) notice.

What about the 22(3) report with this case, some -- no, I guess four or five months went by. We understand there were calls frequently to request a response and none was forthcoming, so the Ombudsman just sent it on to the Premier in the House.

Mr. Boyd: Well, if I may, again, also introduce a reference to the 19(1), we would normally respond to the Ombudsman's intent to investigate within an interval of 10 calendar days.

I do not believe that we may have many claims where we failed to acknowledge the initial notice to the Board and provide a photocopied file.

With respect to the question presented, the 22(3) was not responded to because we have had a series of meetings

over a period of months and we have not formulated, as I said a moment ago, a definitive position on whether or not we could recognize allowance.

Mr. Bell: Is one of the particular reasons why no response was received because you thought you were going to settle this case?

Mr. Boyd: I cannot put it in that fashion. I can only say that we were hopeful of achieving resolution which did not translate into the Board being in a position to allow, but rather to discuss, to analyze, to jointly evaluate the facts presented and then reach a conclusion.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: I have a very simple question, which is in relation to the delay which occurred and is occurring to answer the letter of the Ombudsman's Office.

You knew that this case, Mr. Q's case, was supposed to appear before the Members of this Committee?

Mr. Boyd: Indeed, I did.

Mr. Lupusella: I am sure that you had an opportunity, by appearing before this Committee, to review the case.

Mr. Boyd: I had.

Mr. Lupusella: Did you notice the lack of reply in the letter, and I think that it is fair to this Committee to get in a very clear term the position of the Board in relation to the request which has been made by the Ombudsman, and I think, maybe to the Counsel, we can give some time to the Board to bring out their position in writing, so at least we know where they stand in relation to the issues which have been raised by the Ombudsman.

Mr. Bell: Mr. Lupusella, just let me respond to that. This proceeding is recorded by Hansard and not to be facetious, but if the Board is not prepared to put its position in public now, it never will be and once it does, it will be in written form. I think we all agree that enough time has gone on in this case without affording anybody any further opportunity nor do I believe the Board would ask or need such an opportunity, sir.

Mr. Lupusella: Thank you very much for the explanation. The second question, then, is: Are you planning to make a presentation in relation to the content of the letter which was brought to the attention of the Chairman of the Workers' Compensation Board today?

Mr. Boyd: We shall be responding to that today.

Mr. Lupusella: Okay. Thank you.

Madam Chairman: Any further questions? I guess, if I may make a comment first, I guess my comment is and being new to this Committee, is that I am just surprised that even an acknowledgement, stating your position, was not written at any time.

As a business person, before I came to the Legislature, I was more frustrated in my own general practice when someone would not acknowledge that they had even received the letter and then I wondered if Canada Post had done its job appropriately and, yes, that could be done by further phone calls, but then the onus is on the person writing the letter to document in their file that the person they sent the letter to had even acknowledged it.

My comment here is that even if there has been some established practice, I am just very, very surprised that there is just no correspondence whatsoever that we can see before us with the letterhead of the Board in our documentation and I do not know whether there is a response to that, but that is a comment.

I am just very surprised by that, as a general practice or a generally accepted practice by the Board.

Mr. Boyd: I can assure you, if I may respond to your comment, that it is not common practice with the Board, or it is very rare indeed, that we do not acknowledge a submission in writing.

In this instance, the submission was certainly acknowledged verbally and it was, indeed, understood by the Ombudsman's Office that we were deliberating over the content of that document.

Beyond that, I really cannot add anything further to not having prepared a written response.

Madam Chairman: Mr. McLean?

Mr. McLean: Thank you, Madam Chairman.

You are telling us, then, that you do not object to the recommendation of the Ombudsman or do you object to the recommendation of the Ombudsman?

Mr. Boyd: No, indeed. We had verbally conveyed that we were not in a position to accept the Ombudsman's recommendation.

Mr. McLean: Verbally?

Mr. Boyd: Yes, sir.

Mr. McLean: But you did not give any reasons in writing as to why you objected to it?

Mr. Boyd: That had not happened in that case, no.

Mr. McLean: Why would you not? Do you not want to defend the Board's position or is there some reason that you feel that it is not important that you have to do it, or are you saying that the Ombudsman's recommendation is probably going to be accepted by the Committee and, therefore, we will not bother proceeding. It will be a lot less work for us. Is that your position?

Mr. Boyd: No. Until almost our appearance here today, we were still attempting to reach resolution on that claim.

Mr. McLean: Verbally, with the Ombudsman's Office?

Mr. Boyd: Yes.

Mr. McLean: But you knew this was coming before the Committee for some period or length of time. I fail to see why you would not certainly respond in writing and put in your objections of why you do not feel that the Ombudsman's recommendations should be accepted.

You have not done that and you certainly do not give me any opportunity to review your position and to have any consideration of what your position may be.

You have simply talked to the Ombudsman's staff. This Committee is sitting here without any pertinent information from you, from your Board, and there is no way that I can make a decision when we have got nothing from your Board and, obviously, we would have to accept the recommendation from the Ombudsman.

Madam Chairman: Mr. Glasberg?

Mr. Glasberg: Perhaps I can respond to the points raised. I think the first issue of lack of an adequate follow-up system to provide written responses to the Ombudsman is a legitimate one.

What I would propose to do is to put that procedure in place within the next short period of time and share with Committee Members copies of those procedures, so that you can be assured that the necessary written communications will be provided from the Board to the Ombudsman's Office.

Your second point is also well taken. It would be persuasive, in my mind, if the Board was going to be presenting to this Committee any new evidence or new

information.

Essentially, what we will be doing in our presentations is dealing with the arguments put forward by the Ombudsman which you have before you and which you have had the opportunity to review and to indicate, in our view, why those arguments are inappropriate and why entitlement should not be granted, so there is nothing new in a factual context that you will need to know in order to assess our arguments.

Madam Chairman: Any further questions from the Committee? Proceed, Mr. Bell.

Mr. Bell: Thank you, Madam Chairman.

As I indicated earlier, I really am inviting the Committee to make a deliberate ruling on whether the Board should be permitted to make any response at all and, having said that, I have already told you and it is my recommendation to you that they be permitted to do so with the following caveat, however: If you permit them to make submissions, you have got to rely upon the Ombudsman's Office and those persons, who were part of those negotiations, to tell you what is new and what is not and you are sitting there almost like a referee at a tennis match, trying to determine which to listen to and which not.

I might say, sir, that is one of the reasons why the Committee has said many times in the past, "Get it in writing", so that when it comes here there is not that very significant risk that there is going to be a lot of new things introduced.

Again, having said that, if you do decide to permit them, my recommendation would be that if anything does come that is new, that it be disregarded.

Quite frankly, I think that message, not only for the Workers' Compensation Board, but for any other governmental organization that may be in the same position, is necessary from the Committee. That is all I have to say, Madam Chairman.

Madam Chairman: Mr. Elliot, would you like to respond to that?

Mr. Elliot: Yes, I would. I definitely feel we should hear the arguments of the Board, but I would like to comment that the present procedure, to me, is completely unacceptable and in future, if written comments are not made, I will be speaking very strongly that you will not be able to be heard by the Committee and the reason for this is very simple.

Those of us that took the time to read through all of

the submission prior to meeting today could come to a judgment much more quickly if you had given us a written submission, so, as far as I am concerned, if people come before the Committee in future without having responded to the Ombudsman, I will be talking very strongly that they should not be heard by the Committee.

Madam Chairman: Any further comments? Is it acceptable to the Committee that we hear from the Workers' Compensation Board? Yes, Mr. Charlton?

Mr. Charlton: It is certainly acceptable to me, subject to Mr. Bell's caveat that if we determine there is any new evidence presented this morning, that it be disregarded.

Madam Chairman: Any further comments?

Mr. McLean: Well, Madam Chairman, what type of a presentation are they going to be allowed to make? Are they going to be allowed to put it in writing and present it to us or are they going to be allowed to make a half-hour verbal presentation?

Madam Chairman: It was my intention to suggest a verbal presentation and allow the Ombudsman's Office to interject at any time when it feels appropriate to indicate that the evidence that is being presented is new evidence or evidence that is not documented either/or previously by oral conversations and I would allow them to do that and I think a presentation now would be what I would suggest or I have on for the Committee to accept as a recommendation. Is there -- Mr. Bossy?

Mr. Bossy: I feel somewhat uneasy with the situation that the only thing that can happen by having the verbal representation here and I am sure there will be new evidence that may enter the picture and it will only obscure what we have known, but we cannot use whatever they may be saying, which will be new.

It is going to totally confuse the issue and I sort of feel strongly that if it was not worthwhile by the Board to acknowledge that their decision in the first place was then and they could have done that by letter, which they did not do, now, to start and try and say that in a verbal sense here, before this Committee, I think it will only confuse the entire issue.

Maybe it is a lesson that has to be learned, that if you are going to defend a decision, let us put it writing because if there is another form of appeal, then you can always come back, but I think it is just going to confuse the entire issue.

Forgive me for having made a decision before the

hearing, but reading what I have, I am not very happy the way the Board has handled the whole thing.

Madam Chairman: I think we are all in agreement that the lack of response or anything in writing before us is something that the Board is not happy with and, in fact, to even cloud the matter more, I do believe that there is a second case that will be before us that has no correspondence on file, so we are going to have to deal with this again.

Since there seems to be some lack of unanimity on how we should proceed, before I call it for a vote, are there any further comments? Mr. McLean, thank you.

Mr. McLean: Madam Chairman, I happen to agree with Mr. Bossy at some length here because a verbal presentation is going to be chaos, not only for us but for the Ombudsman's Office.

I would sooner adjourn now and let them give us a -- have a report at two o'clock in a written agreement or a written report and something that we could look at and deal with at that time, but I think we are going to get into a schlemazel here with the Ombudsman cutting in at any time when they feel it is new evidence. We are going to be in trouble.

Madam Chairman: Mr. Bell?

Mr. Bell: May I respond to that? I have had experience in other forums, when people have come at the very last minute before, without having said anything previously and, Mr. Bossy and Mr. McLean, you are right. It is one of the reasons that you are concerned, that you realize that it is going to be an awkward situation and people have taken the time to read the material and have formed certain tentative preliminary views in respect of the evidence and you want to hear from the people first, but you know what; that is the Board's problem, isn't it? I mean, if there is a confused state of record between what is new and what has been said previously that this Committee finds some difficulty in weighing and assessing, that is not your problem and it is not the Ombudsman's problem, it is the Board's problem.

Frankly, I know the Board is not asking for a recess to two o'clock to get a submission in writing. I am not sure it could be accomplished in any event, but again, quite frankly, I am not sure you want to or should be giving them a half an hour or 45 minutes out of an already busy schedule to do that. It is a concession that I do not think is appropriate in the circumstances. Everything you have said is true, but, again, it is not your problem ultimately.

Madam Chairman: Mr. Cleary?

Mr. Cleary: Madam Chairman, I just would like to say that I, too, being the first time in this Committee this morning, I do share Mr. Bossy's concerns and I feel very strongly about it too.

Madam Chairman: I think we are going to have to take a vote on this particular motion.

The motion on the table or the consideration for the Committee is whether the Workers' Compensation Board will be permitted to make a presentation to the Committee with respect to its position on the case before us, the case of Mr. Q, and when doing so, they could be interrupted at any time by the Ombudsman's Office to inform us that the evidence or the information that is being presented is inaccurate. Could someone move that motion?

Mr. Lupusella: Madam Chairperson, I think the issues are two: The first one is for the Board to appear before the Committee and make a presentation; the other one, based on what I heard previously by our Counsel and by the Board, was for a surgical, a medical consultant to appear before the Committee. Am I correct?

Mr. Bell: Yes. But that is not part of what you are considering now. That is for another case or cases and it is really not problematic, in any event.

Mr. Lupusella: Oh, I see, okay.

Madam Chairman: The motion, as it stands, would someone put that forward for a vote? Mr. Carrothers. Seconded? We do not need a seconder? That is wonderful. Thank you, Mr. Charlton. Do we have to wait a time, this procedure? Did anybody want to see if any other Members should be in attendance? Mr. Charlton? No, okay.

Could we have a vote? Those in favour of the motion?
Four in favour.

Against?

And undecided?

Mr. Boyd: I am.

Madam Chairman: Pardon me, Mr. Bossy?

Mr. Bossy: Forgive me, Madam Chairman. I am a little upset concerning the thing, that it had better be handled very strict because we will not be quick enough with the information that we have to be able to identify if it is new and I hope that, you know, that is where we will have to rely on our legal counsel, here, to interfere.

We are going to have interference from the Ombudsman's people as to what is new and then there will be a discussion on every issue that might be new, so I am very nervous about that.

Madam Chairman: The motion has carried four to three in favour of allowing the Board to make its presentation with regard to the case, keeping in mind that the Committee will be watching the presentation closely and the Ombudsman's Office as well.

Anything further? Mr. Bell?

Mr. Bell: Thank you, Madam Chairman.

Mr. Glasberg, will there be anybody with you today who you wish to have beside you to assist in this?

Mr. Glasberg: Yes. I will ask Peter Walker to join me. Mr. Walker is a very experienced Adjudicator and would be able to answer any questions you might have about our hearing loss policy.

Mr. Bell: Just so long as now that you are given the opportunity, you do not say: I have nothing to say, sort of like the snail in the bottle that never was.

Mr. McLean: How long is the presentation going to be, do you suppose?

Mr. Glasberg: No longer than five minutes.

Mr. Bell: Can I maybe just try to give it a little focus and direction?

Mr. Glasberg: Yes.

Mr. Bell: It does not appear to us, from what we heard from the Ombudsman's representative, that there is, perhaps with one or two exceptions, any real dispute on the facts.

The man has a 40 dB loss in one ear and a 20 dB loss in the other ear. There may be some issue as to whether or to what extent he was proximate to whatever noise existed in the work place, and you know the Ombudsman relies very heavily on the April 1986 opinion given by, identified as "Dr. A", and we have heard what Dr. A's opinion is.

Do we take it the Board's response has been under the two issues; (a) we do not accept that there has been a causal relation established between the hearing loss and the work place and, secondly, in any event, we do not have a policy that this fits into?

Mr. Glasberg: In discussions which we had on this issue with the Ombudsman, it had been my impression that the message was conveyed that the Board accepted that the exposure of the worker was such that, prima facie, a claim for noise-induced hearing loss could be filed, so that the only issue before the Committee is whether the worker should be entitled to compensation under the Board's Hearing Loss Policy, so that is the sole issue.

Mr. Bell: Thank you. That is helpful. What do you have to say about that? Why does it not fit within any of your policies?

Mr. Glasberg: First of all, it is not a traumatic hearing loss case. That is a situation because you normally associate the term "trauma" with some very quick event, a very loud noise that does injury to your hearing. This is, rather, a case of noise-induced hearing loss, the typical gradual variety.

Unfortunately, Mr. Q's loss of hearing does not fit the minimum criteria set out in the Board's Hearing Loss Policy, which is basically a 35 dB loss in both ears.

There were some comments made by the Ombudsman's Office regarding the fact that the policy may need to be revised in certain situations, that there is a discrepancy in the treatment of gradual hearing loss and traumatic hearing loss.

The Board is sensitive to these concerns and on December 3rd, 1987 sent a letter requesting submissions from interested parties towards the development of a new Hearing Loss Policy. I have a copy of the letter that went out. I recognize that it is new material and the Committee may not wish to review it.

The bottom line is that the Board believes that the issues involved in hearing loss are so complex that they require to be dealt with by a revised Hearing Loss Policy and the question is, basically: Should we award Mr. Q compensation even though the facts of the case do not fit into the present compensation policy, or should we wait for that policy to be developed and approved by our Board of Directors and then rate Mr. Q?

The Board's position with the Ombudsman is that we should await the development of the policy, so that Mr. Q could then be treated in a similar fashion to the thousands of other workers who may be affected by the Hearing Loss Policy.

Mr. Bell: I understand that and I think I am going to ask Mrs. Meslin to comment whether she has any objections if the Committee sees this proposed policy, but I will set that

aside for the moment.

Are you saying that as far as the Ombudsman is concerned, leave it until we formulate our new policy and then we will deal with this gentleman and at that time he will probably receive some form of benefit?

Mr. Glasberg: I wish I could answer that question for you definitively.

Mr. Bell: What are you holding out, then, because if he is not going to receive anything in the future, then why bother the process?

Mr. Glasberg: He may. I think it is unfair that Mr. Q should be dealt with differently from the other injured workers out there in the community who have chosen not to avail themselves of the Ombudsman's services.

The Board has a policy in place. My personal view is, if that policy was taken to Divisional Court for judicial review it would not be found to be patently unreasonable.

The Ombudsman's Office has some questions about certain aspects of the policy and I believe those questions ought to be dealt with in the context of a comprehensive policy review, where the views of all our major constituents are taken into account.

Madam Chairman: Mr. Charlton?

Mr. Charlton: I have some specific questions about policy as a result of issues which the Ombudsman's Office raised with us earlier. She read to us some items from the policy which did not seem to put in place the discrimination, which by informal practice, you are now imposing in this case.

Perhaps you would like to comment on that. What is the formal written policy of the Board on hearing loss?

Mr. Glasberg: Would that be with respect to the gradual hearing loss, first of all?

Mr. Charlton: I asked you what the Board's written policy was on hearing loss.

Mr. Glasberg: All right. I am going to ask Mr. Walker to respond to that question.

Mr. Walker: Basically, what Ms. Keil had told you is correct. Our policy is that if a worker has a 25/25 dB loss, his claim is approved for health care benefits. If it is also shown that he has tinnitus, he receives an award for the tinnitus.

In order to receive a pension, he must have a 35/35 bilateral loss.

Mr. Charlton: Does the policy not also talk about single ear hearing loss?

Mr. Walker: Yes. When you deal with traumatic deafness, we are --

Mr. Charlton: I do not recall the word "traumatic" being in what was read to us earlier.

Madam Chairman: As a point of order, is this section 42(3) in the policy?

Ms. Keil: I am sorry. For clarification, I was reading from the rating schedule, which is referred to in Section 45(3).

Madam Chairman: Section 45(3), okay. Section 45(3) is what refers to the rating schedule?

Ms. Keil: Yes.

Madam Chairman: Do you acknowledge, Mr. Walker, do you acknowledge that the rating schedule that Ms. Keil referred to and read from is the one which you commonly use?

Mr. Walker: Yes. The Board does compile a rating schedule.

Madam Chairman: That is the the rating schedule that is referred to in Section 45(3) of the Workers' Compensation Act?

Mr. Walker: Yes.

Madam Chairman: Okay.

Mr. Glasberg: If I could respond, Madam Chairman, 45(3) gives the Board the power to develop rating schedules to deal with different sorts of disorders. The most common would deal with cases such as back injuries, but the rating schedule, as it deals with amounts that can be paid as pension benefits, would have been enacted pursuant to Section 45(3).

Madam Chairman: Okay. If you could now respond to Mr. Charlton's question.

Mr. Charlton: My question specifically, then, is: Where in written Board policy on hearing loss does it exclusively associate single ear hearing loss with traumatic?

Mr. Walker: The Board has developed the practice of traumatic deafness is different than an industrial noise-induced deafness.

Mr. Bell: Excuse me, now.

Mr. Walker: We have taken the position that a traumatic deafness is a very sudden insult to the individual and he should or she should --

Mr. Charlton: You have said, though, in practice. There is nowhere in Board written policy where the rating schedule reference to single ear hearing loss is specifically associated with only traumatic hearing loss?

Mr. Walker: I would have to check this out. I cannot state definitely "yes" or "no".

Mr. Bell: Well, I put it to you as a proposition that there is not anything in that policy that speaks to traumatic hearing loss.

Mr. Walker: Again --

Mr. Bell: Do you disagree with that?

Mr. Walker: I will have to check it out.

Mr. Bell: Have you ever read or seen or can you recall anything that would permit you to disagree with that proposition?

Mr. Walker: I would have to check it out. I do not want to answer "yes" or "no" in the event that I am misleading the Committee.

Mr. Bell: Unless the Committee hears from you otherwise, it is entitled to presume that the term or the word "traumatic" is not part of that policy. Can we agree on that?

Mr. Walker: Yes.

Mr. Glasberg: We will undertake to get that information to you, at the latest, by tomorrow.

There is a point which I should raise regarding practice and it is an issue which was dealt with by the Workers' Compensation Appeals Tribunal in Decision 915. There, the Tribunal had occasion to review various Board policies and practices in the area of the payment of permanent pensions and supplementary benefits and if my memory is not mistaken, the Appeals Tribunal --

Mr. Bell: Sorry. Is there something you are referring to?

Mr. Glasberg: No, no. It actually goes to the issue of what the significance of Board practice is. The Tribunal indicated, in its review of that case, that where there was a Board practice of long standing it would not likely interfere with that practice, even though it had not been put into writing in a formal policy.

Mr. Bell: All right. But this was not part of your dealings with the Ombudsman.

Mr. Glasberg: Absolutely not, no, but it goes to the issue of the, I guess, the status of policy and practices within the organization.

Madam Chairman: Mr. Charlton?

Mr. Charlton: Would it not be more correct to suggest that Board practice in relation to differentiating medically between traumatic hearing loss and gradual hearing loss is a medical opinion, developed through Board practice, based on the medical opinions that are submitted to the Board? It has nothing to do with policy.

The differentiation between the two kinds of hearing loss is, the practice is based on medical opinion from outside doctors and from Board medical consultants. It has nothing to do with the question of policy. It has to do with the question of medical judgment and that, therefore, the submission of medical evidence, which changes that view, in fact, on a regular basis in Board operations, changes the way in which the Board deals with that medical item. That is how practice evolves.

Mr. Glasberg: I think we have to remember what Section 45(3) of the Act is really getting at.

You are attempting to determine whether the worker has suffered an impairment of earning capacity and the policy and practices of the organization are designed to assess the extent to which that impairment of earning capacity has occurred.

Mr. Charlton: My specific question to you here is and I refer back, again, to the Ombudsman's presentation earlier, where we had an initial decision by the Appeals Board in 1981, and then we had a subsequent decision by the Appeals Board in 1985.

Based on the current medical evidence in 1981, and medical evidence probably for some lengthy period of time, that those that test hearing could not account for, in a gradual loss situation, a variable loss between one ear and

the other ear.

The Board practice became, if you had a gradual hearing loss, you then had to have a bilateral hearing loss, and that in a case where you had one loss rated higher than the other, the lower became the standard for the bilateral hearing loss associated with the work place noise.

That is how that practice evolved. It had nothing to do with a policy decision of the Board because those were the kinds of medical evidences that were being submitted to the Board.

Now, we are talking here about substantive new medical evidence that changes substantially the view that in a gradual noise-induced hearing loss in the work place you can have greater loss in one ear than the other ear, or is that not how that practice evolved?

Mr. Walker: Yes. I think I would agree with you, Mr. Charlton, and I think part of the policy review was looking at this very question.

Mr. Charlton: So what this Committee then has to consider is, in fact, the weight of medical evidence as it points to the correctness or error of past practice of the Board in terms of its medical judgment of a problem.

Mr. Glasberg: Well, I would have to disagree with that statement. I am advised that there is a Board Order on the books. I am not sure if I have a copy of it, I guess I do, and that it is that the approved Board Order specifically indicates that a permanent disability pension will not be paid unless there exists a 35 dB loss in both ears.

Mr. Cleary: What is that in?

Mr. Glasberg: I believe that is in a Board Order, Board Minute, dated May 9, 1986.

Mr. Bell: Again, this was not suggested that was discussed with the Ombudsman?

Mr. Glasberg: I would be very surprised if -- of course, I could be mistaken -- that they would not have completely reviewed the relevant documentation relating to the Board's authority to --

Mr. Bell: That is not my question. My question was, during the negotiations, in an attempt to resolve this case, that that particular Order was not raised.

Mr. Glasberg: No. It was not, but the Board indicated clearly to the Ombudsman that the present policy was a 35 dB bilateral loss in both ears must be established before

compensation could be granted and I take it that they find difficulty with that proposition, whether or not it is supported by proper Board Orders.

Madam Chairman: Mr. Charlton?

Mr. Charlton: It should be pointed out that regardless of what that Minute says or does not say, that it all happened subsequent to this case.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Well, my concern, based on the issue which you are raising before this Committee about this Board Order, is the fact that this claim has been initiated in 1984. Am I correct?

Ms. Keil: Our case?

Mr. Lupusella: Yes.

Ms. Keil: 1985.

Mr. Lupusella: 1985. And, therefore, it is my understanding that this Board's Order should not be applied to this particular case.

Mr. Glasberg: I am uncertain whether there are any predecessor Board Orders which might have existed and which might have been amended into that final form.

Mr. Walker: Yes.

Mr. Glasberg: If there are, we will endeavor to obtain copies for you.

Madam Chairman: Mr. Charlton, would you like to go on record with your comment? Ms. Keil?

Ms. Keil: Could I interrupt, just for clarification? We have no particular objection to the Board Order because it is only what is said in the rating schedule that I quoted and it refers to both ears; however, the Board Order does not refer to one ear at all, so I would assume that, as we stated earlier, what is in the rating schedule relating to one ear would stand, if that helps in whether or not...

I do not have a problem with that Order because it only deals with half of the chart.

Mr. Bell: While you are getting clarification, do you have any objection to the Committee seeing a copy of the proposed new policy?

Ms. Keil: No. I would only say that it is not a

proposed new policy, as I understand it. It is questions on areas which are to be looked at when the policy is revised. There is no suggestion about where it is going, so, no, I have no objection.

Mr. Bell: There is no text to see?

Ms. Keil: No.

Mr. Bell: Would anything be helpful to the Committee?

Ms. Keil: It certainly indicates areas that they are looking to revise, but it does not tell you whether or how they are going to revise them, but we have no objection to you seeing them.

Madam Chairman: Any further comments before we continue? Mr. Lupusella?

Mr. Lupusella: Yes, I have another question. Why the Board refused to reconsider this particular case in its Decision of June 28, 1983, when, in fact, through the years, we realize that the Board was able to take into consideration a part of the recommendations which have been made by the Ombudsman's Office and the fact of denying the reconsideration of the case is a clear indication that the Board was wrong.

Mr. Glasberg: I think a point I would like to make perhaps deals with the philosophy of where our organization is going these days. I think, historically, there was a tendency very much to bow to the pressures that were out there one way or another.

The Board believes that it is important for cases like this or issues like this not to be addressed in an ad hoc fashion, but that they ought to be dealt with in the context of a comprehensive policy review so everyone is treated fairly and that is the proposition that we are putting forward to you today.

We are asking you to give us some time to deal with Mr. Q's claim. We will do everything we can to expedite the case and I suppose, if the Committee has got a concern that the Board is going to take an undue period of time to reach a decision, it is certainly within your power to say: We will give the Board X number of months and if the Board does not rate this individual at that point in time, then we will ask that certain benefits be paid. That is a compromise.

Mr. Lupusella: The other point which I would like to raise is in relation to entitlement. Mr. Q has a 20/40 dB hearing loss and, based on the material which has been presented before this Committee, it appears that 20 per cent of the hearing loss cannot be accountable by the Board

because, medically speaking, it is not related to the noise which he encountered on the job; am I correct or not? Would you like to intervene on that?

Mr. Walker: I think Ms. Keil did explain the Board's position and the Ombudsman's understanding of the situation. He does have a 40 dB loss in the one ear, a 20 in the other.

Mr. Lupusella: You recognize that?

Mr. Walker: Yes. We accept that. Our present criteria states that he must have a bilateral loss of 25/25 in order to have his claim allowed for health care and for tinnitus, the ringing in his ears. He must have a 35/35 in order to allow the claim for pension and an award for tinnitus.

Mr. Lupusella: But 40 dB are higher than 25 and 35, so why do you not recognize that to --

Mr. Walker: You do not total them.

Mr. Lupusella: Pardon?

Mr. Walker: You do not add them together and take an average. You must have --

Mr. Lupusella: No. You do not give an average. Even on a single ear, you can grant the benefit and the Board is denying that, anyway.

Mr. Walker: In traumatic deafness, we can.

Mr. Lupusella: So that is where you introduce the traumatic element to recognize the 40 dB?

Mr. Walker: If his hearing loss was of a traumatic nature, we would not have a problem.

Mr. Lupusella: So do you agree or disagree with the final statement made by the Ombudsman that this policy results in inequitable treatment of hearing loss?

Mr. Walker: The Ombudsman, I believe, is making this statement based on medical evidence that they have recently obtained from Dr. A.

Until they obtained Dr. A's report, they were in agreement with the other medical specialist who had assessed this worker; in fact, dismissed his complaint originally.

What Dr. A is telling the Ombudsman is certainly something that we must consider.

Mr. Lupusella: Now, the question which flows is: How do you respond to the content of the medical report written

by Dr. A?

Mr. Walker: Well, Dr. A, as Martha has pointed out, is not a Board doctor, did not examine this worker and, in all probability, if we were to take a further look at this case, we would ask Dr. A to examine the worker.

Now, whether the results after examining the worker and his comment as to what he read in the papers will be the same, I cannot answer that.

Mr. Lupusella: You have to understand that this Committee has to deal with facts that are already in the hands of each Member of this Committee and we cannot take the liberty to refer Mr. Q for another independent visit.

My understanding is, why the Board is unable to accept the content of the medical report, in spite of the fact that Mr. Q was not visited by the doctor?

It is medical evidence and you are rejecting this medical evidence because he was not visited and, to continue, I have to argue, then, that has been general practice by the Workers' Compensation Board by surgical and specialist employed by the Board to review medical reports submitted before the Board without them visiting the individual injured worker, why these medical records should be accepted as evidence when we are dealing with each individual case?

It is the same thing. I mean, if we are able to accept certain medical evidence of Board doctors employed by them, reviewing medical evidence submitted before the Board, why the Board is unable to accept a medical report of a specialist that did not visit Mr. Q?

Mr. Walker: I think, in this particular case, that you must look at all of the medical evidence that is available to us and Mr. Q was examined by duly qualified specialists who expressed the opinion that they could not account for the difference of 20 dB in the one ear. I think we have to weigh all of the medical evidence and this is what we have done, is weighed the medical evidence before us.

Madam Chairman: Are you finished, Mr. Lupusella? I do not want to cut this discussion off, but Mr. Charlton can be the last person putting a question and then we could break for lunch.

Mr. Charlton: Yes. I think I must, Madam Chairman, because I think Mr. Boyd (sic) has, in fact, in his comments misstated the evidence that is before this Committee. He suggested that the Ombudsman's Office concurred in the Board's decision until they received the record of Dr. A.

I do not believe that to be correct. The Ombudsman's Office took on this case, according to the summary here from the Ombudsman's Office, based on the report of Dr. E, who also found in favour of the Appellant and Dr. A's report was simply a report, which they requested to seek further advice on Dr. E's finding.

Dr. A's report, in fact, confirmed the findings of Dr. E's report.

Mr. Walker: I certainly did not want to mislead the Committee, but it was my understanding that the Ombudsman did receive this case, did investigate it, and did write to the Board initially and said they found the complaint unsupported.

Mr. Charlton: That is correct. It is just not correct in terms of how you stated it occurred. They changed their opinion on the case upon receipt of Dr. E's report, where Dr. E established that, in his view, the unequal hearing loss was associated to the work-related noise because this gentleman was working on a saw with one ear closer to the saw. The Ombudsman's Office then requested of Dr. A comments on that report by Dr. E.

Dr. A, a consultant which the Board regularly uses, after asking for additional information, confirmed the report of Dr. E.

Mr. Walker: I would agree with that, Mr. Charlton.

Madam Chairman: If it is acceptable, I think we should break now until two o'clock and we will resume at two o'clock in this committee room.

Thank you very much.

Luncheon recess at 12:45 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

WEDNESDAY, JANUARY 20, 1988

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:

Cleary, John C. (Cornwall L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Workers' Compensation Board:

Glasberg, Irwin, Executive Director, Review Services Department
Boyd, John, Former Ombudsman Administrator, Review Services Department
Nemet, Joe, Manager, Review Services Department

From the Office of the Ombudsman:

Keil, Martha, Assistant Director, Investigations
Hill, Dr. Daniel G., Ombudsman
Morrison, Gail, Director, Investigations

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, January 20, 1988

The committee resumed at 2:00 p.m. in committee room 2.

Madam Chairman: I will call the meeting back to order, then. Everybody ready? Mr. Glasberg has informed us that he has a copy of the decision of the order that determined the hearing loss practice within the Workers' Compensation Board and I am not sure if he had advised you of this, Ms. Keil?

Mr. Glasberg: I have just got a memo. We will discuss them now, or --

Mr. Bell: Well, I think it is fair that Ms. Keil should see it and indicate whether she has got any objection if the Committee has a copy. I understood from this morning that she did not have an objection.

Madam Chairman: Are we ready to proceed ahead?

Mr. Glasberg: We will just be about 30 seconds more.

Ms. Keil: We are negotiating. It is part of the conciliatory approach, we are so good at it. The Board would like to introduce some documents, none of which I have seen, none of which has ever been provided to our office.

Mr. Bell: Ever?

Ms. Keil: Ever.

Mr. Boyd: None.

Ms. Keil: None of which has ever been provided to our office, none of which I have ever been made aware of. I have problems with one of the documents being introduced. It is not policy. It is a document. It is undated. It has no signature. It is not indicated as being policy. It is not indicated as being part of the guidelines. I have never seen of it.

Mr. Bell: Well, precisely, are you objecting to the provision of any of that documentation?

Ms. Keil: No, I have no objection to the introduction of something called Procedural Guidelines for Adjudication of Industrial Noise Induced Hearing Loss in Tinnitus Claims, which is the Order, as far as I can see, that preceded the other one that I had no objection to either, but we have not

seen any of them. I just want that noted. Nor were they ever supplied.

Mr. Bell: Were you ever aware of any of the content of any of them?

Ms. Keil: I was aware of the guidelines for adjudication because that is in the policy manual in a somewhat different format. Is that --

Madam Chairman: Well, we will accept whatever you are willing to put forward and nothing else, willing to allow for submissions. There is no obligation on you to do so. If you want to table it, the Clerk will get it from you, and then we will push ahead, if we may.

Now, I believe Mr. Charlton had the last question on the floor and you have finished your questioning along those lines. Mr. Bell, may I turn it back over to you?

Mr. Bell: Mr. Glasberg, I raise just one remaining issue with you and that is the reference and reliance that the Ombudsman has made and has placed on the other four cases involving the hearing losses and the resolution of those cases to the Ombudsman's satisfaction.

Now, as I understand the Ombudsman's position correctly, although the facts of those other four cases are not identical to the facts of this case, and although the policy or policies in question are not the identical policy or policies in question in this case, nevertheless, the Board, in agreeing to resolve those cases, was prepared to and, in fact, modified its thinking and implementation of those policies to fit the facts and to yield the result of a benefit payment. Now, one, is that a fair statement of what the Board did in those cases?

Mr. Glasberg: I would say that the policy was not modified, but for --

Mr. Bell: No, I did not say it was. I said the Board's interpretation and application of that policy was modified to suit the facts of those cases.

Mr. Glasberg: I would say that that was an era when the Board did not feel as strongly as it does now that it ought not to depart from policy.

Mr. Bell: Can I ask you to answer my question precisely?

Mr. Glasberg: Could you repeat it, again, please?

Mr. Bell: In resolving those other four cases, did the Board change its interpretation and application of those relevant policies to suit the facts of those cases to yield the desire to resolve?

Mr. Glasberg: I suppose that is one way of looking at the result. I suppose that there was a desire to settle these cases. The other fact that I am aware of is that when these decisions were on the table, the Board had a proposed policy on hearing loss in place which would have allowed the four claims. I guess subsequent events were such that the Board felt that the policy was not comprehensive enough to stand and, as a result, we are into this exercise of going public with the request for comments on a new hearing policy, so there is no specific policy down the road that we can look to as was the case a few years ago.

Mr. Bell: All right, okay, but I am going to tell you as far as this case is concerned, I am going to take your last answer to be yes, we did modify our interpretation and application of the policy to suit the particular facts.

Mr. Glasberg: I cannot argue with that statement. Another factor that I believe you must realize is that we now have an independent Board of Directors. That Board recently promulgated a delegation of authority document which specifically requires that Board personnel carry out their responsibility according to approved Board policy.

Mr. Bell: I hear you, but I have been around this place for 11 years and with the Workers' Compensation Board, and its predecessor, and I have seen the Board in respect of Ombudsman and Committee matters to be extraordinary creative in finding a way to resolve a case and I suggest to you, for the other four cases, that is what has happened.

Mr. Glasberg: That is a plausible interpretation, but the Board is, I suppose, the message is the Board is no longer interested in creative 'ad hockery'. The Board wants to deal with these cases according to comprehensive policy.

Mr. Bell: Okay, well, that may be the answer to the next question. If you settled the other four the way we have just described and determined, why have you not resolved this fifth case in that way?

Mr. Glasberg: The organization believes that these sorts of cases should be dealt with according to policies that are accepted by our external communities. And we fundamentally see a sense of unfairness in treating this individual differently from the hundreds and thousands of other claimants who down the road are going to be reassessed according to our new policy.

Mr. Bell: How?

Mr. Glasberg: It is a question of organizational philosophy.

Mr. Bell: All right, two remaining items, very briefly and this is purely in the hypothetical, but you have heard me describe earlier today the position that the Workers' Compensation Board has taken with respect to recommendations of this Committee supporting an Ombudsman's recommendation, ie. when you do it, we will do it, and we will not wait upon the Legislature to formally adopt or otherwise. Does that position remain today?

Mr. Glasberg: Frankly, I have not discussed that with the Chairman of the Board and I do not know what his position would be. I could discuss the matter. I will, if the Committee so desires, and get back with a response to you. I frankly do not know the answer.

Mr. Bell: Well, the Chairman, as you know, is a former member of this Committee. I think I could presume what his position will be, i.e. that it has not changed because, I think, he was the promulgator of that position some years ago. But, if you do not know, I will not ask you to speculate. In terms of the dollar implications of the Ombudsman's recommendation, I think you offered the \$8,000.00. What is that \$8,000.00 for?

Mr. Glasberg: My understanding is that it is the value of a commuted pension for Mr. Q. We have had some discussions with the Ombudsman's Office about how we might pay this injured worker if a settlement were agreed to and, essentially, we would go back to the date at which this individual filed his claim. We would pay that person arrears up to the date, let us say a decision was rendered next month, for example, up to that particular date.

At that point in time, the injured worker would be entitled to pension, a lifetime pension. Because the pension is relatively small in numerical value, that is less than five per cent, the Board, pursuant to Section 45(4) of the Workers' Compensation Act, would commute that pension. That is to say, it would give the worker a lump sum payment which would be a present value of future payments. So the individual would get both arrears and a lump sum and the total amount, I believe, would be in the neighbourhood of \$8,660.00.

Mr. Bell: Does that include anything for tinnitus?

Mr. Glasberg: That is right.

Mr. Bell: That number again is eight thousand, six hundred and --

Mr. Glasberg: Sixty dollars and thirty-four cents.

Mr. Bell: I have no further questions, Madam Chairman.

Madam Chairman: Does any of the Committee have any further questions? All right, I have just one which is in terms of this new policy that you are developing that may or may not assist Mr. Q. When did you first inform the Ombudsman's Office that there was some kind of policy, that may or may not help Mr. Q, in place, to the best of your recollection?

Mr. Glasberg: I do not recall. Do you have any idea when you first heard of this new initiative? I believe it was sometime in 1987. To put the matter in some perspective, the Board has been talking about a new hearing loss policy for a lengthy period of time. And I suppose that over the last few years, and the new administration, there have been other policy priorities that have taken precedence over hearing loss and been involved in such things as gold miners' chronic pain supplements, experienced rating.

In my view, because this notice is now out in the public milieu, there is this commitment for the Board to proceed as expeditiously as possible. I believe that is the intention that the first draft of the policy should come before the Board of Directors, possibly in May, 1988. If all goes well, the policy should be in place sometime in the summer. It is hard to predict accurately because hearing loss is an extremely complex subject and that there are a variety of issues that I think will have to be dealt with in a comprehensive fashion.

Madam Chairman: Okay, do you have any further statements that you would like to make at this time?

Mr. Glasberg: No.

Madam Chairman: Would the Ombudsman's office -- Ms. Keil, would you like to make any statements?

Ms. Keil: They are short. The Ombudsman's office does not encourage 'ad hockery' decisions, either. However, we are concerned preeminently and primarily with the merits and fairness of this particular case. It has been our position and been made known to the Board since 1983 that, in our view, the best medical evidence did not support an inequitable treatment of gradual hearing loss and traumatic hearing loss.

It has also been our position that the policy, as it is articulated in written fashion, will allow the payment to Mr. Q. The Board's argument that this might prejudice other workers, in my mind, is answered by the notion that if the policy allows payment to people like Mr. Q, then people like Mr. Q, where it has been established that the greater hearing loss, asymmetrical hearing loss is noise-induced, then those people should be paid, not that this is a

compelling argument not to pay Mr. Q.

There is no written explanation in any of the Board directives or policies to explain the discrepancy in the pension allotment between traumatic and gradual hearing loss. We have presented medical evidence to say that it not be so. Mr. Q's case falls into that category and it is the Ombudsman's sincere belief that it is unreasonable of the Board not to compensate Mr. Q for his acknowledged hearing loss just as it would have done if he suffered a traumatic hearing loss.

Mr. Bell: Do you have any comments or criticisms of the quantification of the Ombudsman's recommendation as offered to the Committee by Mr. Glasberg?

Ms. Keil: What the amount would be, you mean?

Mr. Bell: Yes.

Ms. Keil: No, that is acceptable. It is based on their calculations.

Mr. Bell: Thank you.

Madam Chairman: Any further questions from the Committee at this point? I think we should be in camera for a period of time and we would ask that you all make yourselves available. I should not think our meeting should go as long as 30 minutes and if it is, we will certainly inform you of that and we appreciate it if you do keep yourself easily accessible.

Recess at 2:25 p.m.

Upon resuming at 2:55 p.m.

Madam Chairman: Okay, we are ready to resume. Is there a representative from the Ombudsman's Office? Okay, thank you.

We would like to resume the Committee meeting if we may and the Committee has made a decision in this matter of Mr. Q and the Committee has decided to that the Ombudsman's recommendation as set forth on page five of the letter regarding Section 23(3) letter be supported, that we will report this to the House, in that we will report to the House that this recommendation be implemented as soon as possible.

We will go on to the next case which is on today's agenda which is Mr. X, it is tab D in our books, if you can call this monstrosity a book.

I want to say before we commence now that you have

returned, Dr. Hill, is that in your opening remarks, you referred to the fact that you did not give us your general overview of the Ombudsman's Office and we thank you for allowing us to proceed as expeditiously as possible into the cases and we look forward to hearing from you in that next week or whenever you do have an opportunity.

Mr. Bell: Dr. Hill, you have again some introductory remarks respecting Mr. X.

Dr. Hill: I will be brief, Mr. Bell and Madam Chairperson.

Mr. Bell: I think if you let us catch up to you, where is Mr. X in your introductory, in your opening statement? Oh, he's called Mr. R.

Dr. Hill: Yes, that was a mistake. It shall be Mr. X. That is a typo, Mr. Bell.

Mr. Bell: Whenever you are ready, Dr. Hill.

Dr. Hill: Thank you, Madam Chairperson. I will be very pleased to give you an overview of the whole office as soon as the date is set and we can get to it

Regarding Mr. X, Madam Chairperson and Members of the Standing Committee, the case of Mr. X involves circumstances very similar to a case considered by this Committee in 1985 and reported in the 13th Report of the Standing Committee on the Ombudsman.

The problem in that case and this one involves a back disability which did not arise out of any specific accident, but it is, in my opinion, related to the work of the complainant. In the earlier case, the Committee supported my view that the complainant's disablement was related to his work as a crane operator.

In supporting my view of the matter, the Committee stated in its 13th Report, and I quote, "the Workers' Compensation Board has placed an overly technical interpretation on the definition of accident under the Act". The question of entitlement, compensation and circumstances, such as presented in this case, should not be determined by whether or not a worker had the good fortune to experience symptoms of pain while actually on the job.

I believe the view of that earlier Committee is appropriate to the present case and urge you to support my recommendation that Mr. X be granted entitlement to benefits for the specific period of time noted in my recommendation. Mr. Bell, my Director of Investigations is prepared to present this case.

Ms. Morrison: Thank you very much. My name is Gail Morrison. I am the Director of Investigations at the Office of the Ombudsman. You will see, I have got the good sense to keep Martha beside me while I do this since she knows much more about Workers' Compensation cases than I do.

Mr. Bell: Miss Morrison, I think to make the record complete, the excerpt from the Committee's 13th Report to Dr. Hill has referred the Committee to -- refers to detailed Summary No. 14 in that report which starts at page 21 of the report and through page 23 inclusive.

Ms. Morrison: That is correct.

Mr. Bell: And this particular quote is found at page 23?

Ms. Morrison: At the end of the first full paragraph.

Mr. Bell: Immediately before the Committee's recommendation supporting the Ombudsman's recommendation in that case?

Ms. Morrison: That is correct.

Mr. Bell: And again to complete the record, that recommendation was ultimately implemented by the Board some time after the Committee's report or --

Ms. Morrison: Yes. That, by the way, was the last Workers' Compensation case heard by this Committee back in 1985.

Mr. Bell: Now, just to help us, are you relying upon what the Committee did in that case as a precedent in this case?

Ms. Morrison: No, I am drawing the Committee's attention to the fact that they have considered a similar issue before. I think that the case is very similar, but not, of course, the same. I think the reasoning of the Committee in that case, with respect to the technical interpretation of the Act, may be applicable here, but this needs, of course, to be looked at on its own merits as well.

Mr. Bell: Okay, just to further the Committee, at page 23 of the 13th Report -- well, I guess at the bottom of 22, let me just read a couple of sentences to you and ask you whether you think, or you believe, that applies in this case? In other words, unless the Board, that is the Workers' Compensation Board, is able to identify a specific incident at work, which immediately precedes the complaint of symptoms or injury by the complainant, it will not recognize that, in quotes, "an accident had occurred, arising out of or in the course of employment?" In other

words, the Board does not recognize that a series of repeated events which culminate in physical harm to a worker can come within the definition of accident for the purposes of entitlement under the legislation.

Mr. McLean: What page are you on?

Mr. Bell: I am on page -- now I'm on 23 of the 13th Report. Just dealing with the specific facts of that case from the evidence presented to the Committee, in particular the medical opinions, there can be little doubt that the operation of the crane over the years in question, and in the circumstances presented, at least aggravated and contributed to the complainant's back disability and there, we then have Dr. Hill's quote: "The Workers' Compensation Board has placed an overtechnical interpretation on the definition of accident under the Act...", et cetera, et cetera. Do you say that the Committee's comments in respect that are found at the bottom of 22 and at the top of 23 have application to this case and if so, why?

Ms. Morrison: I think, in that case, the argument between the Board and the Ombudsman was the argument over whether there had been an accident. That is whether there needed to be an individual incident or whether the injury could just develop over the years. In this case, we have a very similar circumstance. The Board, in this case, has not made exactly that argument. The Board's argument is more, and I will let them make it themselves obviously, to do with the sufficiency of the evidence. Now, again, in this case, we have medical opinions which support the connection between the disability and the work as we did in a case.

Mr. Bell: Okay. Well, then, let us forgive that digression by me, then, but at least now I understand what the 13th Report does or does not mean in respect to this case.

Can you, with the benefit of synopsis and the Dr. Hill's 23(3) Report, Ms. Morrison, review the relevant facts and opinions and conclusions arising out of those facts for the Committee?

Ms. Morrison: Yes. Would you like me to go through the documentation briefly first or is that necessary having being through one?

Mr. Bell: I do not think we have to do it as deliberately as we did it before, perhaps, with one exception. Again, there does not appear to be a response to the 19(3) letter; is that correct?

Ms. Morrison: That is correct.

Mr. Bell: I mean a written response.

Ms. Morrison: That is correct, but there is, in this case, a response to the Section 22 Report.

Mr. Bell: That is right. In fairness and particularly at page 25, and 26, from John Boyd, in his former capacity, there is a letter which everybody agrees serves as a response to the 22(3).

Ms. Morrison: That is correct and I have, just before beginning, I asked the clerk to hand out three or four extra pages which should be appended to that letter at page 25. You will see at the bottom of page 25, the letter refers to Memos 30 through 33. Those had been omitted in your documents until today. I have added them this afternoon for the sake of completeness of documentation.

Mr. Bell: And was part of the material available to you during material times?

Ms. Morrison: That is correct. Those were made available to us attached to the letter of October 9th.

Mr. Bell: All right. Well, as I say, again, when you take the Committee through the relevant facts, conclusions, et cetera, I would ask you to have reference to both the synopsis and the 22(3) Report which starts at page 17. But, other than that, I do not think there is a need to go through the documents in any further detail.

Ms. Morrison: Thank you. Before we begin, I would like to say just a little bit about the kind of case this is. This is a disablement case and that is a term of art in Workers' Compensation terminology in one respect. If I may have a moment to find my Workers' Compensation Act, which is hiding in here somewhere. Oh, there it is. Section 1(a) of the Act is the section that --

Mr. Bell: Let us catch up to you.

Ms. Morrison: And you will see in Section 1(a), the definition of accident. There are three. The first two are not applicable in this particular case. We're talking here about 1(a)(iii) "Disablement arising out of and in the course of employment". Those words are relatively vague and in order to make them more clear, the Board has a policy which is applied in cases such as this.

This policy is called Directive 2 under Section 1(1)(a) and it says "Entitlement under the amending Act applying to accidents happening on and after the 3rd day of April, 1963 which includes, under the definition of accident, disablement arising out of and in the course of employment, requires that the disablement which the worker suffers must have some causal relationship with the work being performed. That is, it is not sufficient that the disablement comes on

during work, but rather, there must be something about the work which can be considered to have caused the disablement to come on such as strenuous work, awkward position, unaccustomed strain or even a movement arising out of the work which is reasonable to consider has caused the disablement". That Directive 2, is meant to inform the interpretation of Section 1(1)(a).

Mr. Bell: Okay, Just stop. What do you say are the essential ingredients of that directive?

Ms. Morrison: The essential ingredients, as far as this particular case is concerned, are that it does not have to be a particular incident, that it does not have to necessarily arise at work nor would it be sufficient if it arose at work. But that there must be some causal connection between the disability and the work.

Mr. Bell: What do you say the phrase 'something about the work' means?

Ms. Morrison: I believe that it means that the disability has to be sensibly related in some way to something that the person does while they are working or something that happens to them while they are working. Okay. In Mr. X's case, he was a post person. You will see in the synopsis that he began his work as a letter carrier in 1978.

Mr. Bell: Is a post person the same as a letter carrier?

Ms. Morrison: Yes.

Mr. Bell: Is that the same as a postman?

Ms. Morrison: Sometimes.

Mr. Bell: I thought that was a generic term. I am informed that it is not.

Ms. Morrison: Sometimes a postman and a letter carrier are the same thing. In this case, they are. In 1980, in March, the complainant first noticed onset of pain and discomfort in his lower back. He did not, at that time, seek medical treatment. He did seek chiropractic treatment in August of 1980 and on August, 26th, he laid off, due to his lower back disability.

He resumed work as a letter carrier on September 1st, 1981, so we are talking about a period from August 26th, 1980 to September 1st, 1981. The chiropractor treating Mr. X has given evidence at the hearing and by letter that he believes the work that Mr. X did contributed to his disability. In fact, the chiropractor has done a study of

letter carriers and the conclusion of his study was that letter carriers suffer an inordinate number of injuries of certain types and that these injuries are related to the imbalance of the weight they carry as letter carriers.

This research, which was done by Mr. A, Dr. A, sorry, was reported to the Appeal Board at the Appeal Board Hearing. The research has been verified by other researchers, Dr. D. It is referred to on page 10 of our materials and subsequent to this work by Dr. A, a new mail bag design has been devised, which has a thicker padding for the shoulder strap and, more importantly, in respect to Mr. X's complaint, has a support belt which distributes the weight of the bag more evenly.

Dr. A's evidence to the Appeal Board was that the weight of the bag was not really the problem. The real problem was the distribution of the weight. Dr. A testified at the Appeal Board that he himself had tried carrying a post bag filled with the required weight of mail and found that it very soon caused him distress.

In addition to Dr. A's evidence, doctor C, who was the treating and operating orthopedist, noted both in a written report of February 23rd, 1981, and in his Certificate of Disability dated March 12th, 1981 that Mr. X's disability can be characterized as being causally related to his work.

Mr. Bell: Okay, can I just interrupt you there. For members of the Committee, this is set out of page 17 of your material. The first page of Dr. Hill's 22(3) report at the bottom. Ms. Morrison, as you know, I am a stickler for what doctors actually say as opposed to what they are reported to have said.

Mr. Morrison: Right.

Mr. Bell: Are you able to confirm that what has attributed to Dr. C. at the bottom of page one and particularly the phrase that Mr. X's disability can be characterized as being causally related to the work; is that actually what Dr. C said?

Ms. Morrison: I can read a quote from Dr. C's letter to the medical assessor dated February 23rd, 1981 in which she says, "this man appears to be entirely genuine in his description of onset and symptoms, so that the accuracy of the assertion that his condition appears to have developed out of the course of his work seems to be reasonable".

Mr. Bell: So, we could substitute at the bottom of page 17, which you have just read, seems to be reasonable?

Ms. Morrison: Yes.

Mr. Bell: All right.

Mr. McLean: Causally relate.

Ms. Morrison: Causally related. The doctor has, in his letter, assessed -- stated his opinion that, first of all, the man appears to be entirely genuine. There has been no question throughout this case that this was not a genuine back disability and that his condition appears to have developed. The assertion that his condition appears to have been developed out of the course of his work seems to be reasonable.

Mr. Bell: Can I ask you about Dr. A, or Mr. A, the chiropractor. I'm not sure. Is it Mr. or Dr. the chiropractor? In any way, did he say either in an opinion or to the Appeal Board or to you, that the cause of the disability, the cause of the back problems in his opinion, was the unbalanced bag?

Ms. Morrison: He related the back problems, yes, to the work.

Mr. Bell: Where and how does he do that in your material?

Ms. Morrison: Well, I can read you some excerpts from the testimony. For example, he was asked, 'Would this load carrying contribute to his disability as you have seen diagnosed by yourself?', and Dr., whichever doctor that is, Dr. C, 'In my opinion, yes. In my opinion, it most certainly could be a causal factor as far as setting the stage. It can be just a steady, gradual deterioration'.

And in another place, he was asked about the fact that this worker carries this postal bag day in and day out. 'It would not be an unaccustomed strain because he was carrying this day by day for approximately two years. Would you regard generally the whole situation as being an awkward position for the purposes of relating it to the work. That sums it up. Awkward position'. Again, relating that back, to the Board's own policy in which they suggest that one of the things which they will look at in trying to find out whether a disability is work related is whether there was some awkward position in the work.

Mr. Bell: All right, now, is there any other form of medical evidence that the Ombudsman relied upon in support of his opinion in recommendations in this case?

Ms. Morrison: The medical evidence that we relied upon is the report of November 28th, 1980 of Dr. A, the chiropractor, and his testimony at the Appeal Board Hearing of October 17th.

Mr. Bell: And you have told us about that?

Ms. Morrison: That is right. The other research was done subsequent to Dr. A's research which was general research into the problems of letter carriers. And that is mentioned on page 2 of our Section 22 report. Sorry, page 18 of your materials.

Mr. Bell: The strap that Dr. A has been instrumental in devising, is that in use now, by the postal service or anyone else?

Ms. Morrison: Yes, it is. The postal service is using this.

Mr. Bell: Since when in relation with this complaint?

Ms. Morrison: I am not sure about that. I am sorry, I have not got that date.

Mr. Bell: Do you know, is there any direct relationship between this particular complaint, this particular injury and the implementation -- or the adoption of this new shoulder strap by the postal service?

Ms. Morrison: There is to this extent that Dr. A showed the results of his research which had come out of this complaint and three or four others which he talked to the Appeal Board about at the same time. He said he came upon these more or less consecutively, began his research, presented his research to the union and management officials of the employer, the Post Office in 1980. Subsequent to that, they had these verifications done and so, although it does not relate directly to this particular injury, it is through the research done that arose out of this injury that that design was made.

Mr. Bell: Okay. Now, do you want to go on now and explain to the Committee what the Ombudsman's conclusions were and his reasons therefor?

Ms. Morrison: Yes, if you go to page 18, the Section 22(3) Report, you will see that the Conclusions and Recommendations of the very last part of our report, the Ombudsman concluded from the medical evidence, which was before the Appeal Board, that the low back disability was causally related to Mr. X's work as a letter carrier and recommended pursuant to Section 22(3)(g) that Mr. X be granted entitlement to benefits on a basis of disablement arising out of and in the course of his employment for the period August 26th, 1980 to September 21, 1981. After September 1st, 1981, Mr. X returned to work.

Mr. Bell: What work?

Ms. Morrison: Letter carrying. I hope he has a new bag.

Mr. Bell: Okay. And the recommendation is?

Ms. Morrison: That he be granted entitlement to benefits.

Mr. Bell: And what does that translate to in specific terms?

Ms. Morrison: In dollars?

Mr. Bell: Or otherwise.

Ms. Morrison: It would be entitlement for a period from August 26th, 1980 to September 1st, 1981 and I'm told that the amount is roughly \$16,000.00.

Mr. Bell: And what form of benefit is it?

Ms. Morrison: It is temporary total.

Madam Chairman: Could you explain that for us for those of us who do not know what temporary total is?

Ms. Morrison: Yes, he was temporarily totally disabled so he is being paid like a regular wage for the period that he cannot work. If it happened that the discotomy, which was necessary, caused him ongoing disablement, he would also be assessed for some pension entitlement. Our recommendation here has been for entitlement for that period.

Madam Chairman: Mr. McLean.

Mr. McLean: Thank you, Madam Chairman. Is he still working now?

Ms. Morrison: I believe so.

Mr. McLean: And is there ongoing chiropractor treatment or is he having still medical problems?

Ms. Morrison: Not that I'm aware of.

Mr. McLean: He had this problem approximately for a year?

Ms. Morrison: He had a discotomy in November of 1980, which was necessary because of his back injury and he then recovered from that.

Mr. McLean: You say it was an injury. How did he hurt it?

Ms. Morrison: The medical evidence relates the injury of his back to his carrying of letters day after day. The uneven weight of the mail bag. Oh, do you want to know what it is called, his injury?

Mr. McLean: Well, yes, okay. Tell me what the problem is.

Ms. Morrison: A disk protrusion and the doctor at the Appeal Board Hearing testified that this injury to his back had occurred from the daily uneven distribution of the weight of mail that he carried.

Mr. McLean: Does everybody carry the mail the same way? Does everybody have different --

Ms. Morrison: They have different routes and different amounts of mail.

Mr. McLean: Was it the way that he carried the bag is what caused the problem?

Ms. Morrison: Well, that is why they have modified the bag now because this was causing problems in a lot of mail carriers or apparently.

Mr. McLean: I see, thank you.

Madam Chairman: Mr. Pollock.

Mr. Pollock: Temporary total means that he would get what, 75 per cent of his wages at that particular point in time?

Ms. Morrison: That is right.

Madam Chairman: What did Mr. X receive during this period of time? What did he -- did he get any other kind of compensation during this period of 13 months or 14 months when he was unable to work?

Ms. Morrison: He would have had unemployment insurance benefits.

Madam Chairman: And sick leave from the Canada Post as well?

Ms. Morrison: I would assume.

Madam Chairman: In terms of the new --

Ms. Morrison: These do not pile up on top of those. Essentially those benefits are set off against these benefits. I understand from Martha that they would be paid

back if you were entitled to Workers' Compensation.

Madam Chairman: In terms of letter bag carriers who, you know, I gather, we could have everybody in the Post Office coming forward with this type of complaint. So, just by reason of having delivered mail with the old bag and having loads of 20 to 30 if you had any kind of propensity or tendency towards back problems, this would be a causal relationship if you had a back problem and you were a letter carrier?

Ms. Morrison: Well, I think that there might be some people there who have been injured by carrying letters. If there are, then they are properly compensable under the Workers' Compensation Act.

If they come forth today as suddenly realizing that oh, Mr. X got money, I think I would like some too, then their claim would be judged, the validity of the claim would be judged accordingly. It would be surprising if they would have the medical evidence that Mr. X has to back up their claim. And obviously, they cannot just come forward and say, oh, me too.

Madam Chairman: Mr. Bossy.

Mr. Bossy: I am sort of interested in that, because having been a farmer for many years and also paid compensation and met an awful lot of people that worked in tobacco and tomatoes and cucumbers and had an awful lot of sore backs, whether lower or wherever it was. All of these people could, or many of them could, have qualified for compensation. If this is because of the type of work they are doing, picking up and stooping down and picking up that basket of 50 pounds, not 50 pounds, but carrying this basket along and now, there were many people that were under doctors' care but never drew compensation.

I am sort of wondering here, too, another factor is how much net benefit, if there was an agreement to pay this \$16,000.00, was net benefit to Mr. X. would this be, or are we transferring funds from the Workmen's Compensation to the Unemployment Insurance Commission to a Pension Act. What are we doing here?

Ms. Morrison: Well, there would be some of that because, obviously, he is not entitled. He would not have been entitled to UIC had he been getting Worker's Compensation, so he cannot have it both ways.

To speak to your other problem about the tomato pickers and that. I think, first of all, it has not always been the case that the Act has allowed claims of this sort.

The policy that I read you dated from 1963. The policy

is fairly strict in some respects. It is not just, I was out in my garden and have a sore back from what I did yesterday. It has to be related to the work and the policy does set out things such as an awkward position and repetitive, a particular kind of repetitive action which has to be shown to be in some ways connected with the kind of injury that results. I think that the Act intended that it should compensate people in situations where their work gives rise to their injury, and that's the case here. That is the evidence here that this person's work gave rise to his injury.

Mr. Bossy: Now, you did not quite -- as far as the money transfer, you did not have figures where there is the net benefits to Mr. X.

Ms. Morrison: Apparently, according to Martha's quick calculations, he would get about 15 per cent more if he were entitled to Workers' Compensation benefits than he would have received under UIC benefits.

Mr. Bossy: So, after the payback, he would have the net results of 15 per cent?

Ms. Morrison: Fifteen per cent, right.

Madam Chairman: Mr. Charlton.

Mr. Charlton: I was going to deal with the same thing.

Madam Chairman: Anybody further questions? Mr. Carrothers.

Mr. Carrothers: Turning once again to the causal relationship here, there seems to be some indication that Mr. X might be overweight. I am just wondering if in the medical evidence you have discusses the impact that that might have had on lower back and how that might have been directed with carrying the bag?

Ms. Morrison: There was, as far as I can tell, no discussion of being overweight by anyone other than those memos that I have shown you. He weighed 205 pounds and he was five foot, eleven. I was trying to assess for myself what that is like and asked my husband about it and he said, well, his son who is about five foot, ten and looks after himself well, certainly weighs 205 pounds and he is not overweight. That's very relative to the kind of shape you are in and 205 pounds is not an astounding weight for a five foot, eleven person. We do not have any evidence that he is overweight, except for that comparison. Two hundred and five pounds and five foot, eleven.

The other point that is probably worth thinking about in terms of overweight is had he been an overweight person and

in doing his work, hurt himself, he would not be denied compensation because he was an overweight person, and that is not a relevant factor in deciding whether someone gets compensation for a disability which otherwise arises from his work.

Mr. Charlton: I think there is some discussion in medical literature about stresses on lower back because of being overweight and that may be not the issue. The question I had was whether your medical reports talked about it and you're saying they did not. So I want to be clear about that.

Madam Chairman: Mr. McLean.

Mr. McLean: Thank you, Madam Chairman. I think the \$16,000.00 of temporary approximate total is not an issue here. I think the issue here is the principle and the criteria and the medical reports that are being used. I believe that as the Chairman has indicated, that there are lots of people who could probably or want to apply, but have had sore backs. I do not know why they have sore backs. I know I have had sore backs. I used to be a milkman, but instead of lifting one case, I would lift three and it is my own stupidity, but I had a sore back while doing it. And I think some of these cases like that can happen.

And we have to bear in mind here, when we're talking about because the bag was not proper and may have not have been proper and there is really some reservations in my mind, when we look at the Workers' Compensation Act, it indicates injury on the job and there is a very fine line here whether it was an injury on the job or whether it was from his weight or because he was carrying the bag wrong. It is difficult to say, from a Workers' Compensation standpoint of view that he was injured on the job. So, I have some reservations about it.

Ms. Morrison: Just to answer briefly, this is not just a sore back. I mean, this was a disabling back injury before which he eventually had a discotomy. I do not think there has been any suggestion anywhere that it was anything but a genuine disability. You know, I understand what you are saying about a sore back. I think we ought to clear that this was a serious sore back.

Madam Chairman: Mr. Charlton.

Mr. Charlton: I think she should maybe take that question a step further. I presume that in the medical opinions, which were expressed relating a disk protrusion to his work as a letter carrier and the carrying of the uneven weight, it is what the doctors are saying is that it is the awkward position which caused the disk protrusion to occur, not that the carrying of the bag may or may not have caused

a backache.

Ms. Morrison: That is right. Assuming that the medical evidence given at the Appeal Board was very clear that the way in which the weight was distributed, not the way it sounds was the important factor.

Madam Chairman: Mr. Lupusella.

Mr. Lupusella: Thank you. I have a question in relation to whether or not there was medical evidence on file which might suggest that Mr. X was suffering from a degenerative disk which eventually had been aggravated by the kind of work which he was performing.- Are you aware of any X-rays performed on this man's back prior to the time when--

Ms. Morrison: No.

Mr. Lupusella: --when he went to a surgeon?

Ms. Morrison: No, and he was very young.

Mr. Lupusella: How old is he?

Ms. Morrison: I think he's now, I think he was 30 in 1980 when this happened. So he is a very young man.

Mr. Lupusella: The other question which I have is how do you reconcile the fact which is before us, which is the bag which the man was carrying and the Board's policy in relation to the principle of an upward position, number one, which might have caused the disablement or a movement or movements, as I interpret, arising out of the work. How do you reconcile the two, the bag and the two principles compromised on the Board's position, awkward position, a movement arising out of the work?

Ms. Morrison: Well, in the excerpt that I have read from the Appeal's transcript, the doctor definitely answered the question very clearly that the way in which the mail bag distributed the weight caused an awkward position and he was asked those exact words because those were the words in policy and he agreed that that was the problem.

Mr. Lupusella: Thank you. And the final question is the Board's finding or deliberation which denies the implementation or the recognition of the benefit of doubt. Why the benefit of doubt was not implemented on this particular case when we know for a fact that the benefit of doubt should always be taken into consideration when there are certain factors which are inclined to recognize that particular disablement has been caused by the work performed by the employee.

Ms. Morrison: I think that is a question you might want to address to the Board representative. From reading the Appeal Board decision, the statement is just there, the benefit of doubt does not apply. We, in reviewing the evidence which was before the Appeal Board, felt that there was much more evidence for the connection than there was, there was no evidence against the connection. And perhaps, we would have suggested that they did not need to apply the benefit of doubt because there was such good evidence. But I think that's a question you ought to put to the Board representatives when they have there opportunity.

Mr. Lupusella: And the final question, I'm sorry. I said that was final, the previous one, but this is one is the final one.

Page two of the synopsis which is before us. The Ombudsman's analysis of the issues, number two, the treating and operating orthopedic expressed his opinion in a written report dated December 23rd, 1981 and the Certificate of Disability dated March 12th, 1981. That is the complainant's disability could be characterized as being causally related to his work. How do you interpret this type of expression coming from a doctor which is not extremely supporting the thesis or the principle that the disability, in fact, has been arising as a result of the kind of work which Mr. X was performing?

Ms. Morrison: That is a good question and there are a couple of points I would like to make to that question.

The first is that I will just read again what he said exactly so that you can see the connection between this statement and what he said. He says this man appears to be entirely genuine in his description of onset and symptoms, so that the accuracy of the assertion that his condition appears to have developed out of the course of his work seems to be reasonable. This might seem to be faint, but in a recent book on Worker's Compensation in Ontario, this problem of causation in medical issues was discussed. This book is called "Workers' Compensation in Ontario" by N. McCombie and G. Newhouse. It's a 1987 book, which I was reviewing for this case.

They talk a bit about causation and suggest that the Worker's Compensation system requires a balance of probabilities, connection between two things.

The medical profession, on the other hand, is trained to require a higher standard of proof in arriving at its conclusions as medical people.

So, it suggests in this article, but often you will have a doctor who will not put things as strongly because of his medical training as the WCB doctors may in coming back

because they are used to the standard to prove that is used by the WCB. That is the balance of probabilities. And they suggest that it is very frequent that doctors will use things like 'may be related', 'cannot be ruled out', 'seemed to be connected to', when they really mean on balance of probabilities, it is more likely than not that there is a connection. I think that this statement is quite strong, really. And we would certainly characterize it as evidence for a connection, not against a connection. But that is, you know, I think that's all we can say.

Mr. Lupusella: What is the criteria taken by your office to review the medical evidence which has been submitted before us and why you did not take, for example, the alternative to refer this medical doctor's evidence to an independent specialist for a further review and further findings?

Ms. Morrison: We did not have any medical opinions which went against it and the one which, that one which is the orthopedists, which I have read, is, I think, is fairly straight forward and supports it.

Let me just read you a paragraph of the opinion of the Dr. A. He says, "It is my opinion that the carrying of the mail bag was definitely an irritation to this problem, possibly causative. Doctor _____ -- C concurs on this point. In light of the fact that there was no actual injury, it leads one to suspect that this falls under an occupational hazard and in Mr. _____'s case, it became debilitating. He was not malingering, nor was his pain imaginative. Letter carriers in general have a much higher incidence of low back disorders."

Mr. Bell: Can you strike the Claimant's name from the record, please?

Ms. Morrison: That was not the Claimant's, it was the Doctor's.

Mr. Bell: You also said the Doctor's name.

Madam Chairman: Can we strike from the record, both the Claimant and Doctor's name as well.

Ms. Morrison: Thank you, my apology.

Mr. Philip: It happens at least once in a while. You are the one that did it this time.

Madam Chairman: Please continue.

Ms. Morrison: That was the end of the paragraph.

Madam Chairman: Mr. Charlton.

Mr. Charlton: We have been running this debate around the causal relationship between the work and the injury to the back. Is there any indication from anyone from the Board, from their investigations of the case, or from any other medical report of any other possible cause for a disk protrusion in the gentleman's back?

Ms. Morrison: There are medical reports that suggest there is a causal relation there. No medical reports --

Mr. Charlton: Are there indications from medical reports prior to the claim of any problem of the claimant's back?

Ms. Morrison: No.

Mr. Charlton: Thank you.

Madam Chairman: Yes Mr. Bossy.

Mr. Bossy: I would like to go back to this page two again, number four. The analysis where it says one of the complainant's co-workers and one of his supervisors verified that lower back disabilities are common amongst letter carriers and fairly substantiated the complainant's versions of events and subsequent disability. So, they verify that it is very common amongst letter carriers, that in itself. And I would not know how many cases similar to this that in common have been brought to the Ombudsman for help. In your discussions with the Board to try to resolve this without coming to the Committee, did the Board indicate to you that there were many others that were drawing compensation?

Ms. Morrison: No, they did not.

Mr. Bossy: So that yet it is a very common thing that exists within letter carriers, should the post office or the letter carriers all be warned ahead of time; in other words, that anyone that may have a sore back -- or that this job could cause deterioration of your back. Is every job to be posted to carry that warning?

Ms. Morrison: I think that that might be a good suggestion had they not fixed the problem by adopting this new design of bag. The old bag did not distribute the weight evenly and the doctor connected this injury, this disability to --

Mr. Bossy: So you are saying really that if we pay for this one, we may not have to have any more claims because of that?

Ms. Morrison: But, the new bag is helping.

Mr. Bossy: That is sort of my comfort because of the fact that it is very, very common amongst letter carriers.

Ms. Morrison: Certainly, I think complaints are common. This is a serious disability. I mean, not everyone who says they have a sore back ends up having a disk operation.

Mr. Bossy: I am going to reserve that question that I would like to ask the Board.

Madam Chairman: Any further questions by the Committee at this time? Mr. Bell.

Mr. Bell: Thank you, I think members of the Committee -- Mr. Glasberg, you again want to speak to this matter?

Mr. Glasberg: Mr. Nemet of our office will.

Mr. Bell: All right. Dr. McFarlane, I believe, is somewhere in the audience.

Mr. Glasberg: Dr. McFarlane, would you like to stand up and identify yourself?

Mr. Bell: The Committee may or may not wish to speak to Dr. McFarlane. In fairness though to, I think, in terms of Dr. McFarlane's participation as announced this morning that since then, Ms. Morrison has provided the Committee with three documents, Memos 30, 31 and 33 wherein Dr. McFarlane was an active participant. So, I think it certainly would be appropriate to ask him about anything arising out of those documents. But we will see how far we get.

Mr. Glasberg, the Board's position as known to the Committee is set out in two places in the material, the second page of the synopsis and also Mr. Boyd's letter of October the 9th, 1987, which is at page 25 of the Committee's material and attached four memos. So, with reference to those two locations, can you explain to the Committee what the Board's reasons are for not accepting the Ombudsman's recommendation in this case?

Mr. Glasberg: I turn the microphone over to Mr. Nemet at this point.

Mr. Bell: Thank you.

Mr. Nemet: Thank you, Madam Chairman, and Mr. Bell.

Just before I begin, perhaps I could just make a comment with respect to the Appeal Board decision itself which is, of course, the subject matter of the --

Mr. Bell: That is page four of the Committee's

material, page four and five, the one dated December, 1983?

Mr. Nemet: That is correct.

Mr. Bell: All right.

Mr. Nemet: Regrettably, the Appeal Board did not set out in its decision a detailed analysis of the issues and the evidence it felt determined the question of entitlement in this particular worker's case. As an aside, I can inform the Committee that since the October '85 amendment to the Workers' Compensation Act, by Bill 101, that the Board has made great strides in improving the quality of its decision-making and, in fact, has been subject of commendation from the External Appeals Tribunal in terms of noting the improvement made.

As it has already been said by the Ombudsman, the Board made a couple of findings that are important. Number one, that there was no specific event which would be categorized as an accident and an unidentifiable occurrence. I guess, more importantly and what was really the essential points in the argument before the Appeal Board, they ruled that this was not a disablement which had arisen out of and in the course of Mr. X's employment. As Mr. McLean said, this issue really is one of a fine line and the question is: Can we and can the Committee or the Ombudsman question the fact finding of the Appeal Board which was set up to determine which is a lay tribunal, set up to determine the issues of causation and entitlement for compensation?

Mr. Bell: While you are pausing and while we are on that decision, the number of things that that decision does or does not do. First of all, it references the testimony of Dr. A, i.e., the chiropractor. And Dr. A's study. It also references the opinion of Dr. C, the orthoped, and what it quotes as his opinion there is a definite connection between Mr. X's low back condition and the work he performed as a letter carrier. There is not anywhere in the decision any findings referable to those two opinions--

Mr. Nemet: That is correct.

Mr. Bell: --in a specific sense.

Mr. Nemet: That is correct.

Mr. Bell: Further, the last full paragraph on page two of the decision, page five of the material, the Appeal Board concludes that evidence does not establish that a specific accident in the employment has occurred. Now, can you and I agree that that means as far as this Board decision is concerned a specific incident?

Mr. Nemet: That is correct.

Mr. Bell: Well, we do not have to give it an example, and that is an '83 decision.

Mr. Nemet: That is correct.

Mr. Bell: Can we also agree that that does not represent today, the definition of accident under the Act or your policies for the purposes of determining entitlement to a disability?

Mr. Nemet: I cannot confirm that. I think the problem is --

Mr. Bell: I am sorry, you could?

Mr. Nemet: I cannot confirm.

Mr. Bell: Can.

Mr. Nemet: That is no longer. Now, the problem, of course, is with the Appeal Board Decision itself and the wording of it.

Mr. Bell: No, I am sorry, I just had difficulty hearing. You can confirm that that is not the same?

Mr. Nemet: That is correct. What really has happened, the difficulty with it as you can appreciate is the wording of the decision. What is commonly referred to as an accident and referred to where the Appeal Board notes and accepts, is with respect to the definition section of accident, I quote section 181 and 2, the specific chance event or willful intentional act. Reference to the word disablement, I think, is referenced to III of that definition, the disablement arising out of the course of employment, which together --

Mr. McLean: Point of order. Point of order.

Madam Chairman: Yes, Mr. McLean.

Mr. McLean: You did not get the question. I think the fact was, it was asked: Has your policy changed since and relates - or does not point to a related accident?

Mr. Nemet: No, the policy has remained the same.

Mr. Bell: In the old days, i.e. '83, about three Ombudsman reports ago when we wrestled with the definition of accident. The Board required a specific event. If you were a machine operator, something had to hit you or you had to fall down or something. You had to experience symptoms immediately to be the same, correct.

Mr. Nemet: With respect to one of the parts of the definition of Acts.

Mr. Bell: Right, and in this Decision this Board says the evidence did not establish a specific accident, i.e. a specific event.

Mr. Nemet: That is correct.

Mr. Bell: Okay, and, therefore, because there was not a specific accident, there is not disablement, there is not entitlement.

Mr. Nemet: No, I do not think you can read that from the decision.

Mr. Bell: Well, how else do you read it?

Mr. Nemet: Because they refer specifically to the word "disablement".

Mr. Bell: Well, where do they say in this decision that this man was not disabled?

Mr. Nemet: You have to qualify the word disablement as used in the decision.

Mr. Bell: Where did they say there was not disablement?

Mr. Nemet: They do not. They are saying that it is disablement within the provisions of the Workers' Compensation Act, i.e. disablement arising out of and in the course of employment.

It is clear from what was argued at the Appeal Board from the transcript that what they were concerned about was analysis of whether or not there was a disablement arising out of the course of employment. Now, part of the problem with these decisions was that it is not abundantly clear. You have to go back and examine the circumstances at the hearing to be able to confirm that it is right.

Mr. Bell: I mean, can you and I agree that if they had found that there was an accident, a slip and fall, an accident however they defined it, they would have found disablement?

Mr. Nemet: They would have, but what I am saying is that what they ruled on is that there was not a disablement arising out of the fall--

Mr. Bell: Okay, all right, I understand.

Mr. Nemet: --which does not have to be a non-specific event.

Mr. Bell: Maybe we are trying to squeeze more out of this. Just again for clarification, we can agree now that the phrase 'something about the work'--

Mr. Nemet: Yes.

Mr. Bell: --that is part of your policy.

Mr. Nemet: Right.

Mr. Bell: We can agree now that included in the definition of accident for the purposes of the Act and entitlement, is a recurring incident at work which over time causes or contributes to a disability?

Mr. Nemet: That is correct.

Mr. Bell: Causes or contributes to a physical condition which causes the disability?

Mr. Nemet: That is correct.

Mr. Bell: And in hypothetical terms, it is possible for there to be something about the job of a letter carrier which would cause some kind of injury resulting in some kind of disablement and I am speaking in a hypothetical sense. You are not saying that there is nothing about the letter carrier employment that would cause any type of injury between the disability?

Mr. Nemet: No, I am not.

Mr. Bell: Okay, can I focus it, a bit. What do you say, why do you say that in the circumstances of this man's employment, carrying the bag, with whatever variation of poundage over whatever variation of distance is in question, why do you say that there is not something about that work that caused this injury and this disablement?

Mr. Nemet: What I am saying is the Appeal Board having examined all of the evidence, they were not satisfied that the balance of probabilities, the employment was a significant factor or cause of this man's disability.

Mr. Bell: Well, the Ombudsman says, yes, I have read that report and I have read your file and I disagree.

Mr. Nemet: That is correct.

Mr. Bell: Why do you say the Ombudsman is wrong in that conclusion?

Mr. Nemet: Because I think that you have to examine, as I was saying earlier, about what the Appeal Board is

designed to do and the fact that the Compensation Board was to provide a lay tribunal of organization to adjudicate thousands of claims a year and provide fair and equitable treatment for all workers.

Mr. Bell: Well, do you say that this Appeal Board decision is correct?

Mr. Nemet: Yes, I do.

Mr. Bell: Why.

Mr. Nemet: I say that it is not unreasonable. They are finding a fact and the causative issue is not unreasonable.

Mr. Bell: Why?

Mr. Nemet: Because I think that they were entitled to look at the significance of the work, the significance of the weight, and in relation to the severity of the injury and reasonably conclude that it was not reasonable that that reasonably unstrenuous activity at work caused this type of disability. In addition, the medical report, Dr. C's report, is not particularly strong. It does not set out any detailed theory of causation and has been corrected by the Ombudsman. It just says the assertion of the -- I find the worker to be credible and his assertion that it is work related is reasonable.

Mr. Bell: Okay. How about, and maybe this is not fair to the Appeal Board, because I am not sure of the chronology. How about Dr. A's study? How about Dr. A's study? I mean, It is mentioned by the Board but the Board does not do anything with it. What do you say about that study which appears to have been accepted totally by the postal service and including the adoption of a specially designed strap to balance weight?

Mr. Nemet: Well, I say to that that if that was evidence to suggest that such injuries are possible, but do not forget, the Appeal Board and what the Board is concerned about is, in this particular case, did the work cause the disability? Now the study indicates that that is possible, that is all it does. You have to go by, as a matter of fact, whether or not the disability was caused by the work.

Mr. Bell: Dr. A says that it was. I know specifically what this man did. I have done a study in general terms and I say it did. Doctor C said it did. So --

Mr. Nemet: Well, Dr. C, again to emphasize, did not indicate, just indicated that it was reasonable, and again, relying upon the incidents as they relate to be reasonable.

Mr. Bell: Read your own Board. The Board in the top of

page two to its decision quoting C, he believes, there is a definite connection between Mr. X's low back condition and the work he performed.

Mr. Glasberg: Maybe, I can just add a point at this stage. I think we really have come down to the issue of equality of evidence and we have a report by a chiropractor, who is not a medical doctor. Unfortunately, we do not know fully about the equality of this study. What design would be accepted for publication in a scientific journal. So, I mean, in a spectrum of quote unquote "medical opinions", if ten was a top opinion by an orthopedic surgeon with full reasoning and a complete logical causation, if that is your standard, then the evidence by this chiropractor, in my view, is way over at the other end of the spectrum.

We do have another report from an orthopedic surgeon, but it is a curious medical opinion. It basically says well, because I think this injured worker is credible, I am going to agree that the theory that he's putting forward makes sense. And sure, we have got some medical evidence on file, the inference I draw is that the Appeal Board did not believe that the evidence was of sufficient enough quality, nor was it persuasive.

Mr. Bell: May I just interrupt? Does the Workers' Compensation Board today rely upon the advice and opinions given by Dr. McFarlane in respect of the claim, the circumstances of the injury and the alleged disability?

Mr. Glasberg: I believe that we did ask for opinions from Dr. McFarlane.

Mr. Bell: Are you relying on anything Dr. McFarlane advised or gave by way of an opinion as represented by these memorandums in support of the Board's decision not to implement the Ombudsman's recommendation?

Mr. Glasberg: I believe Dr. McFarlane's opinions supplement the Board's common sense view that this type of incident, carrying a 12 or 15 pound mail bag, was not sufficient to induce the type of injury complained of by this postal worker.

Mr. Bell: Mr. Glasberg, I will ask you a third time. Are you relying on anything Dr. McFarlane advised or gave by way of medical opinion in support of the Board's position not to implement the Ombudsman's recommendation? Now I do not think that is a difficult question.

Mr. Glasberg: Well, I think I have answered the question. It is one factor among others that we have taken into account in taking the position that we are not prepared to accede to the Ombudsman's position.

Mr. Bell: Are you not able to answer that question, yes or no? We either are relying on what Dr. McFarlane advised or gave us by way of opinion, or we are not?

Mr. Glasberg: Well, I think the point is and it is an important one and it is perhaps something that I have not been able to to get across is that medical opinion is one of the variety of factors that must be taken into account in making a decision as to caution.

Within the Boards, the Claim's Adjudicator, the Hearing's Officer or whomever, who is responsible for making the decision, the adjudicator relies on the evidence or the advice. He may rely on the evidence provided by a physician to assist in the decision-making process. But the evidence provided by a physician may not be definitive or else we do not need adjudicators and we should have all the doctors render decisions.

Mr. Bell: Can you refer to page 25 or the first page of Mr. Boyd's October 9th, '87 letter? I do not mean to take a lot of time with this, but I just want to know where Dr. McFarlane's input sits. Do you have that letter?

Mr. Glasberg: Yes, we do.

Mr. Bell: Do you see the last paragraph of the first page?

Mr. Glasberg: Yes,

Mr. Bell: Would you agree with me on a reading of that paragraph that Mr. Boyd proffers Dr. McFarlane's input, at least in part, in support of the Board's position not to implement the Ombudsman's recommendation?

Mr. Glasberg: Certainly, it was a factor and probably an important factor.

Mr. Bell: All right and can we just look at what Dr. McFarlane, in these memorandums, has said to either Mr. Boyd or anybody else that was involved in this process, and I say this with all due respect to Dr. McFarlane who has appeared before this Committee before, has been very helpful. But, this is not intended at all to be a comment on the quality or the weight of what he has said, but rather what the Board looks at.

Would you look at Memorandum 31, Mr. Glasberg, and I just recall what you said in terms of the type of things doctors say and how they say it.

Will you look at the second paragraph where Dr. McFarlane says 'I suspect, therefore, that a weight of 12.5 to 20 pounds would certainly not tax his strength' and then

skipping a sentence, 'it would seem to me that one should be considering whether his overweight might be a wear and tear factor'. Now, you agree with me that that is the type of language and the type of opinion that you just criticized a few minutes ago?

Mr. Glasberg: That is fair.

Mr. Bell: Then, would you look at Memorandum 33, a further Dr. McFarlane. Second paragraph 'However, he obviously is a big man. I doubt very much that carrying a mail bag weighing in the region of 12.5 average over a distance of five miles a day would produce any back disability. I certainly cannot see it producing any wear and tear as mentioned when you consider that his overweight was probably in excess of the weight he was carrying in his bag'. Now, again, would you agree with me that is the type of medical opinion or at least the language of same that you criticized a few minutes ago?

Mr. Glasberg: I believe that it underscores the limits for which we can apply medical opinion. We seem to be asking our physicians at times for them to be magicians. There are limits to their medical expertise. There are fact situations that you would have to be prescient almost, in order to to establish a reasonable connection between the work place and the result.

I think we are in a situation here where we have got conflicting medical evidence and it is up to the adjudicator to make a common sense judgment about whether carrying a mail bag of 12 or 15 pounds is the type of incident that is likely to produce a serious injury, a disk protrusion.

I am not a physician, but looking at the facts from a common sense matter, I am very suspicious about the nature of causation. I would think that a scenario as likely would be that the individual, like many others, did suffer from a pre-existing condition. He had a disk problem. It may have been something else. I am speculating.

Mr. Bell: That does not disentitle him.

Mr. Glasberg: No, it does not disentitle him, but I think you have to look at the question of the extent at which the incident at work may have triggered the underlying condition. Let us be frank. There are tens of thousands of individuals in this province walking around with back problems, and if we are going to take the position that the least trivial incident at work where we cannot establish causation, it is sufficient to entitle us to award compensation, we are going to have a very grave impact on, I would think, the financial viability of the Workers' Compensation system. That is by way of an aside and probably not relevant at all to determining the facts of the

case, but it has got to be something in the back of your minds as legislators.

Madam Chairman: Mr. Charlton.

Mr. Charlton: We have had -- I was listening to this question from Mr. Bell, and we have heard a number of members during the course of the questioning as they refer to backaches and sore backs. Backaches and sore backs can often result from the position which you sleep, the way you sit. Disk protrusions, I would think, do not just happen.

You made a comment a few moments ago about I cannot see carrying a 12.5 to 15 mail bag causing a disk protrusion. Disk protrusions do not just happen. And you again, using the language of many doctors in the reports, made an assumption of a pre-existing condition because you could not envision a mail bag causing a disk protrusion. Does the Board have any evidence at all from this issue?

Mr. Glasberg: The issue was not canvassed at the Appeal Board, so I would assume the answer to that question is no.

Mr. Charlton: Did this claim go to investigation when it was at the claim stage?

Mr. Glasberg: Yes, it did.

Mr. Charlton: Was there any evidence in the investigation of any prior condition that may have related to a disk protrusion?

Mr. Nemet: No, the report on the investigation indicates that the worker indicated no prior back problems and experienced no back problems prior to his employment with Canada Post.

Mr. Charlton: Has the Board any medical evidence which indicates another cause for a disk protrusion, remembering that disk protrusions just do not happen?

Mr. Glasberg: I think that the better question to ask is whether the incident at work caused the injury. It is not, it is not up to the Board in a sense just to speculate on other theories, it is necessary for it.

Mr. Charlton: Now, we have the benefit of the doubt section of this Act when the evidence is equal pro and con. I would suggest that what we have in this case is not even equal evidence. We have two doctors and the Board does recognize chiropractors as doctors and the Board also pays for the treatment by chiropractors. I would suggest to you that unless with evidence supporting -- medical evidence supporting the claimant's assertion that the problem occurred as a result of his employment, that the Board is

required under its own legislation to either find another cause or accept the claim under benefit of the doubt.

Mr. Glasberg: Well, just to explore benefit of the doubt, this provision will only be used under the most unusual circumstances where you have got evidence for and against equally balanced. It is really the odd occasion because usually the facts predominate one way or the other. But the standard of proof within this Act is that you have got to prove the existence of an injury by accident beyond a reasonable doubt.

Mr. Charlton: Accident sub three in this case.

Mr. Glasberg: I am sorry.

Mr. Charlton: Accident sub three in this case.

Mr. Glasberg: In any case. It is unfortunate that the Appeal Board did not see fit to elaborate on its reasons. If they had done so, perhaps we would not be here. I do not know. But unfortunately, we are left in what is admittedly a difficult situation of trying to put ourselves in their shoes and perhaps trying to make an independent common sense decision.

Mr. Charlton: We are not here to put ourselves in the position of the Appeal Board. We are here to consider the evidence in the case and to make a decision. That is our role and, therefore, I am asking you questions related to the evidence that the Board has that would indicate any other cause for something you have admitted does not just happen. A disk protrusion which required an operation.

Mr. Glasberg: Just to repeat, it is not the Board's obligation or onus to disprove some other causes. The onus falls on the injured worker essentially, and since it is an inquiry system on the Board as well to prove that a particular theory of causation is more likely than not.

Mr. Charlton: And is it not the case that in this case, the worker has done that in two medical reports from two separate doctors?

Mr. Glasberg: Well, again, I mean, medical reports themselves are not magical. You have to look at the quality of reasoning that underlies the medical report. And the case of the orthopedic surgeon, that reasoning, in my view, is completely absent. It is as if almost the physician really did not turn his mind to the subject.

Mr. Charlton: Well, we have to look at the reasoning of all of the documents that are before us and as Mr. Bell has suggested, we have got a decision before us here in which the decision relates the opinions of the two doctors and the

study of Dr. A and does not attempt to reasonably show why the Board disputes those opinions.

Mr. Glasberg: That is what we are trying to do now. We are trying to put forward some theory to suggest why the Appeal Board would not have allowed a claim and why, at this point, we feel that decision is not an inappropriate one.

Madam Chairman: Mr. Elliot.

Mr. Elliot: In the sequencing of events, with respect to the chiropractor and the family doctor, in the investigative stage, was there any rationale found with respect to why, in both cases, the treatment was terminated?

Mr. Nemet: Chiropractic treatment?

Mr. Elliot: According to the synopsis, the chiropractor treatment was sought on August the 20th, terminated on September the 11th, saw the family doctor on the 15th. I imagine, he recommended physiotherapy which was terminated October the 23rd. Less than two weeks later than that, in an emergency situation, the individual went into the hospital and had the operation. I am just wondering why, if it showed up, why the treatments were terminated in both cases in the investigation?

Mr. Nemet: With respect to the chiropractic treatment, I believe the chiropractor testified that he continued this treatment because he felt he was, the worker was not benefiting further from them. So, to continue the new fact, I think there was some concern about that further manipulation may exasperate the situation.

Mr. Elliot: And was that the same thing with the physiotherapy?

Ms. Morrison: Yes, certainly with the chiropractic. Since they were not helping, he was sent to his family doctor instead. The family doctor tried physiotherapy, but that was not problem either. In the end, they had to do a discotomy.

Mr. Glasberg: We, I think, have been asking the same sorts of questions that you have, and one theory - and it is speculation only and please treat it that way - is that the manipulation by the chiropractor may have exasperated the back condition. I do not believe that the Board is placing any weight on that theory, but I throw it out to you for the sake of completeness.

Mr. Bell: Let us not get his name on the record, then.

Madam Chairman: Mr. Lupusella.

Mr. Lupusella: Yes, the report which was sent by Dr. McFarlane to Mr. Boyd, he stated that he is a big man. I doubt very much that carrying a mail bag weighing in the region of 12.5 pounds and over the distance of five miles a day could have produced any back disability. I certainly could not see it producing any wear and tear as mentioned when you consider that his overweight was probably in excess over the weight that he was carrying in his bag. I mean, I find this statement a little bit disturbing because it is coming from a surgical consultant employed by the Board and now, using that hypothetical position of the weight of this man, and let us consider the 20 pounds which this man has in excess.

As far as I am concerned, this excess weight is equally distributed around the body. And, therefore, there is no particular implication for this man, when he was walking, to use any specific awkward position to balance his body, and I am making particular reference to the excess weight which he has over 20 pounds. Do you agree or disagree with me?

Mr. Glasberg: Well, I do not believe that the factor of this individual being overweight is a strong factor in terms of our decision not to support the Ombudsman's conclusion. I guess to repeat, we do not believe that there are sufficient causal connections between carrying around 12 and 15 pound mail bag, I mean, there are all sorts of mail persons, I suppose, I know, there are a lot of women now in the post office and we do not believe that carrying around that amount of weight -- it does not make sense that that is the conclusion, I mean, speaking from a common sense perspective

Mr. Lupusella: I did not express this position. It is coming from a surgical consultant, senior surgical consultant employed by the Board. Now, are you telling us that the weight is not a particular item which it should be considered in relation to the verification of items affecting this case?

Mr. Glasberg: Yes, I believe that the fact that somebody is overweight would not disentitle the individual to compensation under our legislation.

Mr. Lupusella: You are discounting, therefore, this particular position taken by your surgical consultant employed by the Board, of course?

Mr. Glasberg: I do not believe that the factor of the individual being overweight is a consideration that we have taken into account.

Mr. Lupusella: The reason why I am getting into this particular discussion is that we are trying to get into the definition of recognizing the type of work which Mr. X was

performing as related to the nature of an awkward position or movement which he was performing in the course of his employment. And, therefore, my second question is in view of the fact that the bag was weighing 20 pounds, do you agree or disagree with me that the weight was causing a disbalance on this man when he was walking for the delivery of the mail? I mean, that is physics, as far as I am concerned.

I am extremely convinced that there is that this balance as a result of this 20 pounds which he was supposed to carry and he was supposed to make a further adjustment while he was walking to make sure that the weight would be compensated for something else, was supposed to make an adjustment when he's walking. I mean, is this clear? Do you agree or disagree with that statement?

Mr. Glasberg: I am not sure what weight this theory of unbalance, which I think is a chiropractic theory, would have in --

Mr. Lupusella: That is physics, that is physics. I mean, we have a body, we walk and the weight of the body is equally distributed and the back, of course, is able to compensate to the weight of our body. Now, when you put a 20 pound weight on one side, you have to make an adjustment while you are walking; am I correct or not?

Mr. Glasberg: It makes sense what you are saying. But, by the same token, I mean, the postman is free to transfer the weight at the back presumably from one shoulder to another. There will be a time when perhaps there are 20 pounds in the mail bag, but towards the end of the delivery day, there may be nothing there. So, I mean, I get back to this common sense view of carrying around a mail bag is likely to produce an injury of this nature.

Mr. Lupusella: Sorry, you're going too far. Let us go back a little bit to the principle of the policy described by the Board that a particular weight might cause an awkward position on the man's body.

Now, do you agree or disagree with me that the bag might cause this awkward position and the man was faced with particular adjustments which, or stress, which he was supposed to place on his back to make sure the balance was to take place? I mean, that is physics. I mean, you do not have to get chiropractor theory. I mean, you can visualize the action of this man with this 20 pound weight.

Mr. Glasberg: It could be an awkward position. I cannot argue with that fact. But even if we do have an awkward position, we come back to the definition of disablement which says we have to show that the injury arose out of and in the course of employment. 'Out of' means

because of employment. There has to be a reasonable causal connection that makes sense on common sense principles.

Mr. Lupusella: It is the awkward position which might cause the disablement of this man and, again, you are trying to discount completely certain facts which are before you on the case of Mr. X.

Mr. Glasberg: I guess -- I am sorry to interrupt. I guess it depends on whether you feel carrying a 15 pound mail bag--

Mr. Lupusella: 20, 25.

Mr. Glasberg: --whatever the number, it puts you in a awkward position.

Mr. Lupusella: So you do not see that?

Mr. Glasberg: I am saying it is possible.

Mr. Lupusella: It is possible.

Mr. Glasberg: And you are not discounting that this awkward position was causing certain movements on this man's back for a suitable period of time, two years, I think, he has been going through this process. How long, two years?

Mr. Glasberg: Two years. I think it is possible, but I do not think it is likely.

Mr. Lupusella: Now --

Madam Chairman: Mr. Lupusella. Mr. Lupusella, is your line of questioning winding down? You're doing a great job.

Mr. Lupusella: The final question is if it is possible, why the workers -- why the Board did not implement the benefit of the doubt in this matter?

Mr. Glasberg: Well, if the evidence were 50-50, it would be a relevant consideration. My view is that the evidence against allowing this claim, again, on common sense principles, outweighs the evidence provided to support it.

Madam Chairman: Thank you, Mr. McLean.

Mr. McLean: How many months did this person take chiropractic treatments, roughly?

Ms. Morrison: Three weeks.

Mr. McLean: Three weeks. And when did he go in for an operation?

Ms. Morrison: A month later. No, two months later.

Mr. McLean: Two months later. And was it in the lower back or really what did that operation do?

Ms. Morrison: It was a disk protrusion in the lower back essentially.

Mr. McLean: It was a disk that--

Ms. Morrison: Yes, it was a disk.

Mr. McLean: --that was probably removed or whatever.

Ms. Morrison: Yes, well, the protrusion was corrected. It is called a discotomy.

Mr. McLean: But, would it be possible for that to happen regardless of whether he was carrying a mail bag or not?

Ms. Morrison: Spontaneously?

Mr. McLean: Well, it did not happen spontaneously from what I gather. It was something that seemed to be coming on because he had been off and then back and coming back and I am just wondering if that could have happened regardless of whether he was carrying 20 pounds or 15 or any pounds of mail? The reason I ask that is because he has had no problems since, obviously.

Ms. Morrison: Not that we know of.

Mr. McLean: For something like seven or eight years and was it something that may have been from previously --

Ms. Morrison: There was no evidence that he had ever had anything wrong with his back before.

Mr. McLean: It is possible though that this could have happened regardless of whether he was carrying a mail bag or not?

Ms. Morrison: Something would have to cause it. The problem, I think, is that the evidence before the the Board did not suggest any other cause. There were two pieces of quite strong evidence that did suggest this cause.

Ms. Keil: And if you look at the nature of his complaints, he complained of back pain and a lot of radiating pain down the right leg which is quite common and when the surgeon was discussing it, he talks about the disk protrusion with quite severe nerve root entrapment on the right, which would cause the radiating pain which, in fact, he did complain of as he worked.

Mr. McLean: I have it on the left leg and I do not know what causes that.

Ms. Morrison: Carrying any mail recently?

Mr. McLean: No.

Madam Chairman: Are you finished, Mr. McLean?

Mr. McLean: How long was he in the hospital?

Ms. Morrison: I am not sure I have that information. He was operated on November 17th, 1980. I have the information that he returned to work on September 1st, 1981, but I do not know whether I know how long he was in the hospital.

Mr. McLean: He would be rehabilitated, for several months, probably.

Ms. Morrison: Yes. It says admitted to the hospital November 4th, 1980, discharged the 1st of December, 1980. So, he was in the hospital for almost a month and then, of course, he would have to recuperate at home.

Madam Chairman: If I could have final questioning from Mr. Bossy.

Mr. Bossy: Yes, just a short question here, because you are quite satisfied that you have made a decision because of the causal nature of what happened here, and you are also quite satisfied to say that if you would have made a decision other than what you did, it could become setting a precedent or do you have, because you were handling thousands of cases, in other words, you could review other cases because of causal nature that you made decisions. Would this be precedent-setting in allowing the Ombudsman's challenge to your report or your decision?

Mr. Glasberg: To be fair, our Act says that each case has to be judged on its merits. But I think the fact that this case was allowed would obviously because it is an Ombudsman's case, and it is a decision of the Standard Committee to obtain a certain amount of notoriety within certain industries, and I think the Board would then likely be required to review a great many files, and that this decision would be used time and time again as suggesting, well, you allowed compensation in this case, why are not you allowing in our case.

Mr. Bossy: I find it sort of passing strange that with the experience and the amount of cases you deal with, that you could not reflect both upon other cases that would be very similar in being able to say well, this is the reason

why. We made that decision and the causal nature of the case, the evidence was not sufficient and you must be satisfied that you made that decision on that basis.

Mr. Glasberg: Well, the facts do differ. They really do and that is why it is necessary to look carefully at each case.

You raised a point a little earlier about whether it has been the Board's experience that many postal workers have brought claims for back disease or for disability. In canvassing my staff, the preliminary impression is that there are not many cases which are brought to the Board. That may either be because problems have not arisen or that there is a sense the Board is not going to allow those claims. You can choose whatever theory sounds most palatable to you. But it does not seem to be, in any way, a significant problem in that area.

Madam Chairman: Thank you, Mr. Bossy. I think we should adjourn the discussion on this particular case until tomorrow at 10:00. It has been a long day and we expect you all to return tomorrow and appear before us again.

Did you want to make a statement?

Mr. Glasberg: Madam Chairman, I had understood there was a possibility of an agenda change for tomorrow and I was wondering which case you would be dealing with first?

Madam Chairman: Yes, we did discuss that.

Mr. Bell: The way it is scheduled now it is U before E. Now do you want to do E before U?

Ms. Morrison: Do you want to go U before E?

Mr. Glasberg: The order is fine. We just wanted to know which people.

Madam Chairman: For the Committee's benefit, the agenda reads differently. We're doing Mr. U first on the agenda tomorrow, after completion of the one we are currently hearing, and Mr. E will be heard after that one. Okay, so there has been a reversal.

The other one, the Committee's discussion is that we had agreed that we would sit on Monday at 2:00 given that we will probably need that additional time. Mr. Philip, who is committed to another Committee and has been leaving us throughout the day, has informed me that his Committee, which was to sit Friday and not Monday, is now sitting on Monday, and I just open for discussion if people would be interested at all or agreeable to sit Friday, this Friday, instead of next Monday.

Mr. Philip: Sorry to be an inconvenience and I realize that some people cannot at this late date. It is just that unless we invent a new form of metaphysics, it has been very difficult for me today to be in two committees at one time.

Madam Chairman: Mr. Charlton.

Mr. Charlton: Under normal circumstances, I would have no problem with that, but based on a discussion yesterday, I have already booked several things for Friday.

Madam Chairman: Mr. Elliot.

Mr. Elliot: I would like to add to that. I think that the way things have gone the last month, that Friday and Saturday are the days we can really talk to our constituents and I have sought dealing Friday and Saturday for the month.

Madam Chairman: Is there anyone in favour of the alternative position? I, too, have some other, but I just wanted to, just in case, to have --

Mr. Philip: Thanks for raising it. I realize that it was kind of a long shot, because people do have commitments and I understand that.

Madam Chairman: Yes, we are sitting Monday afternoon at 2:00 for two purposes, one, maybe that if we have not dealt with our case load as of Thursday afternoon, if we have not dealt with Mr. U or Mr. E, whichever one -- Mr. E, then we would carry that one over until Monday, perhaps at 2:00 and if not, we are not going to advance the agenda. We have other things that we have to discuss with respect to this.

Ms. Morrison: And you would not require us back?

Mr. Bell: Sure, we require you, but not necessarily for these recommendations in our cases.

Ms. Meslin: You are just adding a half a day to our schedule?

Madam Chairman: We are adding half a day to our schedules so that -- 2:00 because we did lose Tuesday morning and that we have a limited amount of time to deal with so many matters.

So we will adjourn till tomorrow at 10:00. Thank you very much.

The committee adjourned at 4:30 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

THURSDAY, JANUARY 21, 1988

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:

Lipsett, Ron (Grey L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Workers' Compensation Board:

Glasberg, Irwin, Executive Director, Review Services Department
Nemet, Joe, Manager, Review Services Department

From the Office of the Ombudsman:

Morrison, Gail, Director, Investigations
Hill, Dr. Daniel G., Ombudsman
Keil, Martha, Assistant Director, Investigations

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, January 21, 1988

The committee met at 10:10 a.m. in committee room 2.

Madam Chairman: If we can call the meeting to order, please.

I believe we were in the midst of questions being received by Irwin Glasberg and Joe Nemet with regard to the case of Mr. X, and if we could resume that questioning at this point, Mr. Bell.

Mr. Bell: Yes. I just have one other area that I will refer to members of the committee for final questioning.

Mr. Glasberg or Mr. Nemet, either of you, the Board in its decision that we looked at yesterday, particularly at page 5 of the material -- one moment, Madam Chairman.

Sorry. Mr. Glasberg, I understand you have been given copies of the material in the same order as the committee members have?

Mr. Glasberg: I was this morning, yes.

Mr. Bell: All right, good.

The Board, at the bottom of page 5, specifically addresses the doctrine of benefit of doubt and specifically decided that it did not apply.

Can we agree that as of the date of this decision that that doctrine, and I am paraphrasing - and I know you know it better than I and you can correct me if I'm wrong - but that doctrine said essentially that where there is an approximate equivalence of evidence for or against in a particular issue - and the phrase is 'approximate equivalence' - that the benefit is given to the injured worker or applicant in respect of that issue.

Is that a fair statement?

Mr. Glasberg: It is almost a fair statement. I think we have to look at Section 3(4) in its entirety.

Mr. Bell: 3...?

Mr. Glasberg: (4) of the Workers' Compensation Act.

Mr. Bell: What version are you looking at?

Mr. Glasberg: I guess I am looking at the present version.

Is it your suggestion that the version of the Act that applied at the time the Appeal Board decision was rendered was different from this section?

Mr. Bell: Well, I was asking that question.

As you may note, sir, this committee had some part in the drafting of that policy back in -- probably 1980 there was a drafting exercise in this very room, if I recall, between the Board, the Ombudsman of the day and this committee of the day.

Now, I cannot tell you precisely if what is in 3(4) is what was finally addressed, nor can I tell you -- you are going to have to tell me whether, as of December 19th, 1983, they were one and the same?

Mr. Glasberg: In my discussions with Mr. Nemet, I think I have the answer for you - the present section states that - and I am quoting:

"In determining any claim under this Act, the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable..."

And I emphasize the phrase 'not practicable':

"...to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant."

I am advised by Mr. Nemet that the term: 'where it is not practicable', was not in the version of the Act that predated this one, but that it was Board policy.

The point I am making is that the section, Section 3(4), cannot substitute for a party putting forward a reasonable theory of causation.

I would agree with your contention though that where the evidence for or against is evenly balanced, the Act requires that the worker be given the benefit of doubt.

Mr. Bell: Okay. Well, can we agree that in practical terms and in practice the phrase: 'where it is not practicable', really only means where you cannot make a decision because the evidence is approximately equal?

Mr. Glasberg: I would say it means where you cannot draw a reasonable inference based on the evidence that is available.

Mr. Bell: Because it is approximately equal?

Mr. Glasberg: Because it is approximately equal or it may not be definitive.

Mr. Bell: And I hope that two lawyers do not put everybody in the room to sleep during this discussion.

Let's get on the table the reason for this policy, because in the normal adversarial context - and you use the balance of probabilities as the test - where the injured worker in the normal context is the applicant or the plaintiff or whatever other designation you want to give the seeker of relief, that where you come to a tribunal and you cannot meet the onus and you go over the approximately equal in weight, you lose your case?

Mr. Glasberg: I would phrase it slightly differently.

If we are dealing with a balance of probabilities, shall we say, the onus would fall on both the Board and the injured worker to prove, let's say, on a 51 per cent range of probability or higher that a given incident at work caused a specific condition.

3(4) says that if the evidence is 50/50 you give the injured worker the benefit of the doubt and, in my submission, it would be really the extraordinary case where the evidence was so evenly balanced for and against that you use the provision.

Mr. Bell: I tend to agree with you out of context, but let's just understand.

But for the policy and but for 3(4) where an injured worker on an appeal seeks relief and the evidence after the hearing is approximately equal in weight, that injured worker would lose because he did not meet the onus?

Mr. Glasberg: That is correct.

Mr. Bell: Right. And this policy, or now statutory criteria, says that where there is an exception such as in a workers' compensation appeal, where it is approximately equal in weight, you are going to win?

Mr. Glasberg: That is correct.

Mr. Bell: Okay. Now, having said that, and let's line it up in view of the evidence of Dr. A the chiropractor which includes not only a chiropractic opinion but includes the results of a survey which we now know, with perhaps the benefit of hindsight, developed into a new way of carrying mail bags; in view of the evidence of Dr. C an orthopaedic specialist - and I remember your comments of his opinion

yesterday which, frankly, were not complimentary although it seems that the Appeal Board describes his opinion in a different context - together with the absence of any evidence coming from the other side, that this disability was caused by something else, how does this Board justify a finding that the benefit of doubt does not apply?

Mr. Glasberg: Well, let me deal with each of these points in the order that they are presented.

First, we do have the testimony of a chiropractor on file and that testimony was also presented to the Appeal Board.

Let's recall that a chiropractor is not in the same league as an orthopaedic surgeon and the quality of opinion evidence provided by a chiropractor to an expert tribunal must be accepted with caution.

I mentioned yesterday that we have had a spectrum of medical opinion. On the one hand we have a truly excellent opinion provided by a qualified specialist after a thorough examination and with complete logical reasons based on a decent theory of causation. We give that a ten in the spectrum.

On the other hand we have got opinions rendered by individuals who do not have medical degrees, we do not know the quality of the study upon which these opinions are based, and I would suggest to you that a court of law would not put much weight on that sort of opinion. My conclusion would be: It is over at the end of the spectrum where you might accord it marginal weight at best.

You then rate the point about allegedly Canada Post incorporating the new mail bag design. We do not have any evidence on the table to suggest whether the use of that bag was efficacious to any degree.

In addition, my understanding is that in civil suits the fact that some occurrence has taken place after the event is not germane to the question of liabilities. So once again, I do not see that as a particularly strong factor. Then we have the opinion.

Mr. Bell: Are you suggesting the Court of Appeal never hears new evidence?

Mr. Glasberg: Well, I suggest that you might want to accord it some weight, but I do not consider it to be persuasive.

We do not have a well-designed study on the table which compares postal workers who use that bag and who use the old design with results that indicate that the new design was

actually beneficial. I mean, we are speculating to some extent.

Mr. Bell: All right, I hear everything you say - forgive that cliché phrase - and I anticipate what you are going to say about Dr. C because you said it yesterday.

I anticipate what you are going to say about the other evidence that is lined up in favour of the complainant. What do you say is lined up against the complainant?

Mr. Glasberg: Just to reiterate and to refresh the minds of committee members as to the Board's view of Dr. C's opinion: the basis for Dr. C's opinion appears to be the credibility of the injured worker.

The orthopaedic surgeon met with the individual and decided that he was credible. The medical report does not contain what I would consider to be a detailed explanation or a reasonable theory of causation. So, once again, I believe it ought to be accorded limited weight.

But let me now deal with the question that you have posed and that question is: What has the Board got on the other side to suggest that this claim ought to be allowed.

In the best of all possible worlds I suppose it would have been desirable for the employer, perhaps in this situation, to have called evidence during the hearing perhaps calling an orthopaedic surgeon to refute the evidence put forward by the chiropractor which had questionable weight.

Similarly, perhaps the Appeal Board ought to have asked for post-hearing submissions and obtained the opinion of an orthopaedic surgeon.

Unfortunately that was not the case. So we are left in the position of having to determine, to some extent, what was in the mind of the Appeal Board when it rendered the decision and also to look at the issue from a common-sense perspective.

Mr. Bell: Stop there though. What that means, I believe you just said, is: There was no evidence called from the other side.

Mr. Glasberg: There was no medical evidence put on the table at the hearing by the employer.

Mr. Bell: Or any other form of evidence.

Mr. Glasberg: Well, I believe that the chiropractor did put forward some evidence on the degenerative disc disease in response to questions which were posed by the Appeal

Board.

Mr. Bell: No, but the chiropractor is the injured worker's witness.

Mr. Glasberg: That is right, but I think we have to remember that hearings that take place before the Appeal Board are not adversarial in this strict sense; it is an investigatory body.

The Board approaches these sorts of hearings in that fashion because on many occasions either the injured worker or the employer is not represented. So the objective is really to get to the bottom of the issue and put all the facts on the table.

The Appeal Board members took an active role in this hearing and solicited information which, in my submission, goes to support the theory that the type of incident; that is, carrying...

Madam Chairman: Point of order.

Mr. Bossy: Point of order, for a point of clarification. Did I understand you to say that the employer was not represented?

Mr. Glasberg: The employer was represented, but it appears that the employer's representative did not take a particularly active role in the hearing.

Mr. Bell: Or lead any evidence?

Mr. Glasberg: That is correct. That is part of the difficulty.

Mr. Bell: Sir, I interrupted you, but a few minutes ago you were listing for the committee the evidence on the other side, if you will.

Mr. Glasberg: There was that medical evidence solicited from the chiropractor by the Appeal Board.

I guess what the Appeal Board was doing was trying to put on the table some common-sense negotiations dealing with degenerative disc disease and the questions between a relatively trivial weight being carried around and the onset of such a serious back problem as a protruding disc.

As I said before, the Board looks at this case from a common-sense perspective. It acknowledges that there exists some evidence on the table to suggest that there is a causal connection. We would be foolish to say that evidence does not exist.

The point is that the evidence provided is not of a sufficient quality to displace the common-sense perspective or view that a postman carrying around a 12- or 15-pound bag for certain periods during the day with frequent stops ought not to develop this type of back injury.

It is not common in the trade and the facts do not seem to fit. The adjudication process is not one based solely on the interpretation of expert opinion. That is one important factor to take into account, but there are others.

Mr. Bell: Well, where in the Act or your policies or your directives or anything else, as of 1983 or at any time, is an Appeal Board panel of the Workers' Compensation Board entitled to render a decision based on common sense, ignoring the evidence led before it?

Mr. Glasberg: I do not believe the Appeal Board ignored the evidence, I believe the problem was that the Appeal Board did not articulate as clearly as it should have the basis for its decision.

Mr. Bell: All right. Where do you say, or what is the authority that you say an Appeal Board is entitled to base its decision on common sense?

Mr. Glasberg: Well, I could ask the same question about the courts.

Mr. Bell: Well, we are not dealing with the courts.

Mr. Glasberg: I am saying there are clear analyses between the courts and this type of tribunal. The adjudicator - and where a matter is appealed the Appeal Board - must make decisions based on Section 3(1) of the Act.

There must be a determination as to whether the injury arose out of and in the course of employment and, in rendering that sort of decision, the sensible adjudicator will take into account all facts which are relevant to the the issue in dispute.

Mr. Bell: All evidence that have been tabled before him. He cannot pull something in off the shelf in his office.

Mr. Glasberg: Well, again, we are not strictly in an adversarial system and if it was a court of law and the employer had not led certain type of common-sense evidence, perhaps you could take the perspective that the court ought to ignore it.

But you can rest assured that the Appeal Board in rendering its decision looked at the decision rendered by

the Appeals Adjudicator - which was the level below the Appeal Board - and thoroughly reviewed the file.

And I believe you also have to take into account that the Appeal Board was a specialized tribunal and, in that respect, it had occasion to hear many cases which were perhaps not entirely similar to this one but did raise the issue of degenerative back disease and, I believe, in that context, it was perfectly appropriate for the Appeal Board to apply that expertise in assessing the facts of the case.

Mr. Bell: So we should read 3(4) of the Act with or without the practicable phrase to mean that; evidence approximately equal in weight can include the common sense of the tribunal?

Mr. Glasberg: I think that you are probably driven to that conclusion and, in my mind, it is not an illegitimate conclusion.

I think it is important for the members of the committee to look at the facts as a whole and to determine whether, in your mind, it is more reasonable than not that carrying this relativity minor weight around was the causal factor which led to this major disc problem.

Mr. Bell: Okay. Is there anything else that you say, by way of evidence under your definition, that is lined up on the other side? I want you to be complete with the committee in a listing of that evidence.

Mr. Nemet: Well, if I could just go through just mentioning again, in terms of what Mr. Glasberg said in terms of the evidence of the chiropractor, there was discussion between the chiropractor and one of the commissioners as to degenerative disc disease and, in fact, I think I am quoting the chiropractor by saying we are all walking timebombs.

Mr. Bell: Yes, you and I?

Mr. Nemet: Exactly.

Mr. Bell: That does not entitle either of us to assume we will be paid disability benefits in respect of an accident at work; does it?

Mr. Nemet: There is one other factor to be taken into account that some people from the age of two on - as given in the evidence of the chiropractor - have degenerative disc disease or problems and the rate of that problem varies with the individual.

Mr. Bell: Is there anything else?

Mr. Nemet: There is also reference by the chiropractor that a lot of these symptoms are asymptomatic, in fact, he makes reference to one x-ray that he viewed in terms of another patient of his that had degenerative disc problems which he thought would have been symptomatic, but at that point were asymptomatic.

So I think at this point, the significance of the lack of back problems or complaints by the worker prior to his employment as a letter carrier is...

Mr. Bell: Evidence from left field, from somebody not party to the proceedings on the side against this client?

Mr. Nemet: No, it is the opinion of the chiropractor -- he is admitting that you can have situations where you have serious degenerative disc disease and it can be asymptomatic which I think discounts, again, the significance of the fact that the worker said he had no complaints of back problems prior to his employment with Canada Post.

Mr. Bell: Notwithstanding the chiropractor's opinion as recorded by the Appeal Board that he found a real connection between the disability and the work?

Mr. Nemet: That was clarified near the end of the proceedings in terms of -- his opinion was: definitely an irritation to the problem was possibly the causative factor.

Mr. Bell: Except you are stuck with what the Appeal Board found.

Mr. Glasberg: That may be true, but at the behest of the Ombudsman we are reconsidering this issue. And I think that there have been criticisms about the quality of the decision rendered by the Appeal Board and it is perfectly logical, in my mind, to go behind the decision into the transcript and Mr. Nemet has indicated that the term 'possibly' is used by the chiropractor.

Possibly in my mind does not mean 50 per cent or 51 per cent, possibly means speculative.

Mr. Bell: But it means some evidence.

Mr. Glasberg: The bottom line, in my view, is whether some evidence is enough to warrant compensation being paid under the legislation.

The test, I would repeat, is whether, on a balance of probabilities, the individual, by carrying this mailbag for certain periods of time, received this pretty severe back injury. That is the test.

Mr. Bell: Well, modified by 3...?

Mr. Glasberg: Exactly, but I guess the point I am making is that the application of the benefit of doubt should be extraordinary because usually when you add the evidence up for and against and look at the matter from a common-sense perspective, you will be able to come down one way or the other.

In some ways I think 3(4) is a cop out and it prevents adjudicators or decision-makers from very carefully analyzing the facts and making a decision as to what is more probable than not.

Mr. Bell: I have heard 3(4) described as humanitarian. You called it a cop out.

Mr. Glasberg: Well, it is humanitarian, but I think that it is often very easy to base a decision on 3(4). The real challenge comes in weighing the evidence.

Certainly there will be cases where it is legitimate to use that section, where the evidence is more or less balanced for and against, but the legislature, by including that provision, did not intend that it should be used as a substitute for determining whether causation exists under Section 3(1).

Mr. Bell: Assuming that there is no other evidence on the other side, I have no further questions.

Mr. Glasberg: Fine.

Mr. Lupusella: I have a supplemental on that.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Reference has been made to the statement made by the chiropractor that the man was suffering from the degenerative disc disease and it appears that we are all suffering from that problem.

Now, even though this is the case -- I mean, in my experience in the past, the Board accepted the claims on the premise that aggravation of a disc disease had been accepted even though pre-existing conditions were existing.

Now, I do not understand why you have not used this evidence against the claimant when, in fact, the Board might take into consideration cases of pre-existing conditions which have been aggravated by a particular work activity which was performed by the claimant.

Mr. Nemet: Well, the question really is: Absent this man's work as a letter carrier, would he have suffered this type of injury in any event due to the fact that he had

degenerative disc disease? And...

Mr. Glasberg: Just merely by the duties for which he was employed.

Mr. Philip: Where is the proof of degenerative disc disease?

Mr. Nemet: Well...

Mr. Philip: So his opinion is marginal in one case when it suits you and highly important in another case?

Mr. Nemet: No. I am just saying for the purpose of the opinions he rendered, the operative report, and some of the other medical reports.

Madam Chairman: Mr. Charlton?

Mr. Charlton: I just have a couple of brief questions.

Throughout the course of your testimony to the Committee you have repeatedly used the phrase 'common-sense decision' and 'reasonable'.

Now, you have told the committee that the Appeal Board panel that heard the case are lay people. You have got an opinion from an orthopaedic surgeon who is an expert in his field who treated the claimant in question and who operated on that claimant and who has expressed the opinion that it is reasonable that the problem resulted from his work.

Why, in your approach to common sense and reasonableness, do you give more weight to the lay judgment of what is common sense than to the expert opinion of what is common sense and reasonable?

Mr. Glasberg: Well, I mentioned earlier that there is a spectrum in terms of the quality of medical opinions which are provided. In this particular case, the opinion, although rendered by an orthopaedic surgeon, was based on very poor reasoning and, on that basis...

Mr. Charlton: I think an orthopaedic surgeon would suggest the same of your comments here.

Mr. Glasberg: Well, the fact of the matter is it is not a physician who adjudicates claims and that is a persistent criticism which we hear all the time from what...

Mr. Charlton: What you are telling this committee is that lay common sense, in medical matters, is more important in the weight of a case than expert reasonable common sense?

Mr. Glasberg: I would say this: If a medical opinion

is persuasive it carries extraordinary weight in the adjudicative decision. Where medical evidence is questionable, based on speculation and not thoroughly reasoned, it has much less weight.

And - if I might finish - if that is the case, then the medical evidence isn't persuasive, the adjudicator has the obligation to consider other facts, matters of experience and to apply common sense.

Mr. Charlton: Well, it would appear that everybody except the Board has accepted the medical opinion as persuasive.

My second question to you is this: You raise the issue of degenerative disc disease and I think - although most of us may not understand the full nature of the disease or what causes it or all of the medical innuendos that hang with that disease - that the name itself describes something that is degenerative?

Mr. Glasberg: That is right.

Mr. Charlton: That is declining -- or increasing, if you like, as a disease, but that the structure of the back is declining.

And you have raised the point that the chiropractor suggests that degenerative disc disease can be asymptomatic; i.e., it can be there without being a problem for some time but, obviously, if degenerative disc disease was the problem that caused the protrusion, the disease had reached the point where it was no longer asymptomatic.

Has the claimant in this case had any problems with his back since the operation for the protrusion?

Mr. Nemet: I am not aware of any further problems.

Mr. Charlton: So would that not then suggest that your supposition that the degenerative disc disease was the problem, in all probability, is unlikely?

Mr. Glasberg: It is hard to answer that question because the operation that the individual underwent likely solved the underlying problems.

Mr. Charlton: Degenerative disc disease does not traditionally restrict itself to one disc.

Mr. Glasberg: Well, I am not an expert in the field - we do have a physician available - but it is my thought that you can have different degrees of wear and tear at certain disc levels.

Mr. Charlton: There is no question about that, yes.

The point is that we are now talking about some seven or eight years since the original incident and no recurrence of a problem in the claimant's back.

Mr. Glasberg: Well, I frankly do not know the answer to that question.

Mr. Charlton: Well, does that not though suggest, in terms of how we interpret the evidence - which is what you are asking us to do - does that not suggest that the likelihood is that the problem that caused the disc protrusion was other than degenerative disc disease?

Mr. Glasberg: I cannot accept a conclusion. There are alternative hypotheses. The condition may have become asymptomatic. I do not know that the issue of what happened subsequently can provide us with much guidance on the question of whether, at a particular point in time...

Mr. Charlton: You asked us to weigh the evidence in terms of the probabilities. Now, you are riding around on theories that nobody has even suggested to this point.

If these theories exist, why were they not medically suggested?

Mr. Glasberg: I do not believe that I was putting forward any theories. The record seems to suggest that there is a possibility of degenerative disc disease and I guess it is up to this committee to determine whether, based on the nature of the work, it is the degenerative disc condition which more likely than not caused the medical condition.

Mr. Charlton: All right. You just suggested that there is the possibility of degenerative disc disease, so we are back to not even being sure if that is the case.

Do you not think that - given serious degenerative disc disease may have caused the disc protrusion - that either the chiropractor in question or the orthopaedic surgeon who did the operation would have made comment about that? Do you think these gentlemen are that unprofessional?

Mr. Glasberg: You know, it is hard to know what a physician is going to put in a medical report. A lot of it depends on the questions that are asked and the purpose of the report. I think that they are the two theories.

Mr. Charlton: You are telling me that an orthopaedic surgeon who has done an operation, who has been in that back, who has looked at x-rays, who has probably done all kinds of tests before the operation is done; an orthopaedic

surgeon who is aware of degenerative disc disease which may have been the cause of the problems would not mention it at all and say to the Board that it is reasonable that the claimant's view of what happened is likely?

Mr. Glasberg: I believe that the physician's report was prepared with the objective of obtaining disability under the -- I am sorry. I am sorry, that is incorrect.

I do not know what questions the physician was asked, but bearing in mind the quality of the response, I am not surprised that it was not a full response.

I cannot answer that question. I think we have two theories of causation on the table and we have got to decide which is the most likely.

Mr. Charlton: Yes, but we have evidence of one of the theories and no evidence of the other theory.

Mr. Glasberg: Well, I would disagree with that. We have opinion evidence of limited weight for the reasons that I have...

Mr. Charlton: In your view they are limited weight.

Mr. Glasberg: That I described on several occasions.

On the other hand, we have other evidence suggesting that degenerative disc disease could have caused this irrespective whether this individual was an outside postal worker or had some sedentary job in an office. That is one theory on the table.

The other is that the condition is work related. I am still of the view that the nature of the work carried out by this individual ought not to have precipitated the condition.

Mr. Charlton: One final question: Has the Board consulted with the employer, Canada Post Corporation, about their decision, as a result of their consultation with the chiropractor and his survey and the subsequent studies that we understand were done in relation to his findings -- have you consulted with the employer about their decision, their common-sense decision as a result of what they found, to spend money to change the bags which letter carriers use?

And if you think about that in the context of Canada Post Corporation, you are talking about significant dollars right across the country.

Have you consulted with them about what they found and why they made their decision and do you not think that would be reasonable and common sense?

Mr. Glasberg: Regrettably neither our office or I guess the Ombudsman have asked for detailed information from Canada Post. I might stand corrected. I cannot tell you.

Mr. Charlton: No, but you are an agency that is dealing with work-related problems for individuals on an on-going basis.

Is it not your responsibility to keep on top of new findings about things like this? Do you not think that would be reasonable and common sense?

Mr. Glasberg: I think that is a very reasonable suggestion that you have made and what we will do is contact Canada Post and get the full details and share the results both with the Occupational Health and Safety Division and the Health and Safety Education Authority.

I guess at times it is only going through these cases in detail that these issues emerge and can be acted upon.

I should tell you, though, that the employer has been in contact with the Board on a number of instances and is very concerned that this case will be allowed by the Standing Committee. That is the nature of the conversations which we have had with the employer.

Mr. Charlton: Everybody is concerned about their assessments, we understand that.

Madam Chairman: Thank you.

Mr. Pollock?

Mr. Pollock: Well, I am concerned about this mailbag too, the fact that they were brought in after this happened would have some merit, however, before 1980 this mailbag I take it was used for years and years.

Was there ever any complaints made to Canada Post that the mailbag was inadequate; was there ever any complaints from the Union of postal workers that the mailbag was inadequate?

It seems rather strange to me that we had postal workers carrying around a mailbag that was not the right type of mailbag and yet we had enough knowledge to put a man on the moon before that.

Mr. Glasberg: I frankly do not know the answer to that question. As I indicated yesterday, I made some informal inquiries about the number of cases for back strain brought to the Board by postal workers and the tentative answer that I have is that it does not appear to be a problem.

Madam Chairman: Mr. Pollock, anything further?

Mr. Pollock: No indication at all that it has been a problem before or after?

Mr. Glasberg: Not to my knowledge, but I should emphasize that I really do not know enough about the problem to give you an honest answer.

I think the issue is important and, irrespective of what happens today at the committee, I believe the Board has an obligation to follow up on this and perhaps do some statistical work.

Mr. Pollock: Well, I think that would be beneficial. All right.

Mr. Glasberg: Consider it done.

Mr. Pollock: Thank you, Madam Chairman.

Madam Chairman: Any further questions at this time?

So what we have before us here, in my view, is two points of view; one which is that it was work related and the other which is that this injury was not work related and we have to decide at this point, on a balance of reasonable doubt or probabilities, which is the more likely, in particular given Section 3(4).

Do you see that?

Mr. Glasberg: Yes.

Madam Chairman: Thank you.

The Ombudsman office; would you like to say anything, Ms. Morrison?

Ms. Morrison: Yes. I would just like to make a couple of comments because I think the issues have been very thoroughly canvassed by the committee. I think this is a very important case and it is probably more important than it looks on its face.

We have here a situation in which the Appeal Board has clear evidence of a work-related disability. The Appeal Board did not say anything about the evidence not being good enough, it did not say anything about not liking chiropractic evidence, it said nothing in its decision which would suggest that it found fault with the evidence.

It just states the evidence very clearly in its decision on page 5. It says: Dr. A testified X and Dr. C testified

Y. Both of these pieces of evidence were in the worker's favor. The Appeal Board then just said no.

You have been asked to find that this is not a work-related disability on the basis of common sense. The problem with that is that the worker has no possibility of answering that argument at the Appeal Board, he does not know what he faces in that situation.

Essentially what the Board is telling you is that if we have two opinions or three or six which say one thing, and our common sense tells us something else, we can ignore those opinions, we can ignore evidence with impunity, so long as we can argue that our common sense tells us something else. Now, I think that would be a very important thing for you to decide, that the Board can do that.

And, in this particular case, there is no question that there really was a back disability, there has never been any question of bona fides of this complaint. He did have disc protrusion. He did not have - according to the x-rays led - he did not have degenerative disc disease. It was not mentioned in the medical reports, it was talked about in the hearing but it was not in the medical reports.

There was no question of his credibility. His co-employees also testified at the Appeal Board hearing. They also agreed that that problem had arisen since he became a postal worker. Even his supervisor agreed.

Canada Post was represented at the hearing. You cannot think that they did not have an opportunity to put their view, they did. They did not bring any evidence to the contrary.

So we have evidence for connection, no evidence that it arose, if in any other way, and no evidence against the connection.

And what the Workers' Compensation Board is asking you to do is allow them to say: Ignore the evidence, use our common sense and make the decision.

It would make you wonder why you would bring the evidence at all. If the Board is to make the decision on a common sense basis, they could do it with or without the evidence.

So although this is a very small claim, it is not a huge claim, it does not look like a very big issue, I think it is a very, very, fundamental issue that you have to decide as to whether or not the Board can displace evidence - never mind benefit of the doubt, it was not applicable because there was not equal weight of evidence, all the evidence was on one side.

Whether they can displace that evidence with their common sense without bothering to tell the worker the argument he has to meet or his representative has to meet, that is a very important decision and I think we should take it very seriously.

Madam Chairman: Any questions?

Mr. McLean?

Mr. McLean: Thank you, Madam Chairman.

Certainly I am not changing what I have said before; there is fine line, however, when I listened to the evidence that has been given here I have to base my decision on the fact that (a) there was an operation, there was a problem; whether it happened on the job or not, I still feel that that employee, from what I have heard, acted very up front and very properly; the fact that there was an operation, the fact that that employee has worked continuously since he went back to work.

What alternative has he got when he has had the operation. What other avenue could you suspect that that injury could have been caused from other than somewhere on the job?

So basically, Madam Chairman, my decision is based on the fact that (a) there was an operation and that had to be caused from some injury, or one way or another. And I think that, much as I understand the full debate on it, I think I have to be in favour of the employee in this case.

Madam Chairman: Any further questions at this time?

(No response)

I have one just with respect to the Appeal Board decision that is laid out on page 4 and 5 and, Mr. Nemet, when he first came up made a reference to this, I think, right off the beginning and said that this was what the Board would term an incomplete or less detailed appeal decision than they would like, and that this more recently has been rectified and appeal decisions are more detailed.

Is that correct? To the best of your knowledge, is this correct? I would like to hear from the Ombudsman first and then from the Board.

Ms. Morrison: I think it is. I think we are getting much better and more detailed decisions.

I should point out though that in our process we have this decision and can decide whether the Board was -- you

know, looking at the reasonableness of the Board.

We also provided the Board with every opportunity to give us more reasons afterwards and, as you saw from the memos that were attached to the final response from the Board, the only reasons other than what are here that we were given had to do with some suggestion that the complainant was overweight.

Now, even had there been something behind this decision which had not been brought out that the Board really felt should have been explained in more detail to us, they had the opportunity to explain that to us later and we have never seen it.

Madam Chairman: Mr. Glasberg?

Mr. Glasberg: I guess I am surprised by that comment.

Really we seem to be in a game of writing letters with the Ombudsman's office. We had a very full and detailed discussion of this case with three representatives of the Ombudsman's office who are here today, where we had the opportunity to very frankly put forward our theories of causation.

Our committee has just undergone a restructuring. We have got several new members and it is sometimes only after a review of a case - at the 11th hour, so to speak - that new ideas come up.

Perhaps there is an analogy in terms of legislators looking through bills and each time you go through the exercise something new seems to come up.

Now, I really regret that the Board is, in a sense, being penalized because written materials were not transmitted to the Ombudsman's Office.

Perhaps while I am on this point - I do not want to stray - but I do want to deal with the issue that came up yesterday regarding the Board not providing its final written submissions to the Ombudsman and, hence, to the committee.

I must confess that I was very surprised yesterday when I came here and was told that because the final written submission had not been presented, the Board would be precluded -- possibly not be given the opportunity to make verbal submissions to the committee.

I had not at all been advised of this fact, my staff tell me, by either the Ombudsman's Office or the committee, so I just wanted to put that point on the record.

Mr. Bell: Let me put another response on the record, Mr. Philip, if I may first.

You may have been surprised, sir. You may not have been aware, sir, but the Workers' Compensation Board has been aware for years what its obligations are with respect to the Ombudsman process and this committee's process. If you like, I can give you chapter and verse from previous reports.

The fact that you were not given any prior specific notice of what may have been an unfortunate result for the Board yesterday, frankly, is irrelevant. You were fully aware -- as a matter of fact your Chairman, sir, was part of the decision-making process of this committee wherein those first rules were enacted.

Regrettably you were not informed that certain written responses had not been either prepared or were required. If your comments are intended to be a form of criticism of this Committee or its counsel - speaking as its counsel - they are rejected.

Mr. Glasberg: I believe that the Board bears some responsibility for the fact that it did not know exactly what was going to be expected of the organization. We ought to have picked up the telephone and called to make sure. So I am not suggesting that someone other than the Board was to blame.

But I feel that it would have been helpful, at some point in the process, if someone had reminded us that this was necessary and if that had occurred, I guess that the quality of the material and the submissions which we could have provided would have increased, but please do not misinterpret my comments. I believe that it was the Board's obligation to determine exactly what was required.

Mr. Bell: Well, just two brief things.

First of all, my information is that the Board was reminded by the Ombudsman's Office of the obligations in that respect.

Secondly, as for the quality of the submissions - I was going to say this at the end of the four cases and I will say it now - I think the quality of the submissions have been first rate.

I think - and I say this with all due respect to people who have appeared before you, some of whom are in this room - I think the quality of the submissions made by you and your representatives on behalf of the Workers' Compensation Board have been fair, have been candid and have been of a very high quality.

As a matter of fact, it has enabled this Committee to get, in relative terms, probably as quickly to the merits of the matter as it ever has before. And so you are to be commended and even extraordinarily so, based on the apparent incomplete briefing, if I can use that euphamism.

So I do not think anybody is criticizing the way you did your job. The criticism is this: That this committee has significantly had its process interfered with and the parties did not do what they were supposed to do; that is, pin their positions down.

So enough said by me.

Mr. Glasberg: I appreciate those comments and the bottom line is simply that we want to provide as much useful information as we can to the committee to help it with its decision-making.

I would just like to get back to the question that was posed. I am responsible for the internal appeals system within the Board and I can assure you that a case or a decision like the one you are reviewing would now be totally unacceptable.

The Board believes that there is an obligation to the parties who come before it, and who make legitimate arguments, for the decision to reflect those arguments after carefully indicating why the hearings officer, for example, accepted one argument as opposed to another.

That type of decision is no longer acceptable. Unfortunately, that is the case that we are dealing with today.

Madam Chairman: Mr. Philip?

Mr. Philip: I am surprised that you use the analogy of comparing this committee to the committee dealing with a bill. Surely the role of a committee dealing with the proposed legislation is to collect new information and to look at that bill in light of the new information and to make whatever necessary changes are needed based on that new information to make sure that the bill is in keeping with the objective of that bill.

The role of this committee is quite different. It is to take what information is available and to pass judgment on that information. That is why we constantly stress the non-partisan nature of this committee. It is quite different from any other committee and I find your analogy just absolutely preposterous and unacceptable.

Mr. Glasberg: Perhaps it was a poor analogy, I agree.

Mr. Philip: The other point I would like to make is that this committee over the years has constantly taken the position that we will not accept new evidence.

The reason for that is that we are not here to retry a case, we are here to pass judgment on a case, the evidence of which has been already decided on and, hopefully, the facts at least have been agreed to.

And the moment that this committee allows a submission with information that has not been at least tabled in some form before, we are opening ourselves up to the possibility of either side introducing new information either by intent or by accident and we cannot place ourselves in that kind of position.

And that is why I think members of the committee are very concerned about what has gone on in this case and the other three cases.

Mr. Glasberg: May I deal with your first point for a moment?

When dealing with Ombudsman cases, you are dealing with an extremely high level of analysis and the amount of work that needs to be done in order to adequately address the points that are made requires a pretty careful review of the file, and it is only in that sense that sometimes when senior people in the organization sit down and look at a file, that new items come to light. That is the only point I wanted to make.

I share your view entirely that new evidence ought not to be parachuted onto this committee at the 11th hour, that is terribly unfair to members who have done their best to prepare for the case, and that certainly would not be my intention.

Madam Chairman: Is there any closing remarks you would like to make, Mr. Glasberg?

Mr. Glasberg: I think pretty well the points that the Board wished to make have already been articulated.

Madam Chairman: Thank you very much.

Any further questions before we go to a decision? None?

(No response)

We would like to ask people in the audience or in the room, other than committee members, if you would kindly leave the room at this point.

If we feel the decision will take longer than 30 minutes, we will reserve our decision.

Thank you very much.

The committee continued in camera at 11:15 a.m. in committee room 2.

11:55 a.m. (Resumption of normal business)

Madam Chairman: Go back on the record.

Thank you for your patience. I hope it was patience in waiting for us to discuss the matters involved in this case and I would like to report on the case of Mr. X.

The committee has decided by motion to support the recommendation by the Ombudsman on page 3 of his report made pursuant to Section 25(3) of the Ombudsman Act.

The committee will be reporting this decision with reasons to the House in its next report with the recommendation that the Ombudsman's recommendations be implemented by the Workers' Compensation Board. The Committee expects that the Board will act immediately to implement this recommendation.

We are now ready to proceed with the next case on the agenda which is at Tab F and it is Mr. U and the Workers' Compensation Board.

My suggestion is that we go until 12:30 and try to stop as close to 12:30 as we can and resume again at two. Is that acceptable?

I think if we can get a little bit of the presentation in here then we will be on our way, because we are behind schedule by just a bit. How is that; 'just a bit'?

There is documentation being handed out on the anterior view of the human skeleton. Dr. Hill, would you like to begin.

Dr. Hill: Thank you, Madam Chairperson.

I have a very brief comment to make before turning the case over for presentation to Martha Keil our Assistant Director.

Mr. Lupusella: Which case is this?

Madam Chairman: Case U at Tab F.

Dr. Hill: In Mr. U's case, and the one to follow, the committee will be considering whether a work injury to one

part of the body aggravated a pre-existing condition elsewhere.

This is a complex issue which requires close examination of the various medical opinions. While at work Mr. U fell down an embankment and injured his back. Later on, his underlying hip problems became symptomatic and required surgery. The Board could not believe there was a connection between the hip and the back injury. It, therefore, denied benefits.

Our own investigation has revealed that Mr. U had only complained of hip problems since the accident. He had no problems before.

Equally persuasively three orthopaedic specialists and the family doctor were of the opinion that the work injury aggravated the hip problem. The one specialist even took the time to attend Mr. U's Appeal Board hearing to give evidence in support of his opinion.

One specialist who saw Mr. U on one occasion made no mention of a hip problem and one Board doctor could not find a connection.

My conclusion: I found that the Board's decision to deny entitlement was unreasonable given the preponderance and weight of the medical evidence. I represented that Mr. U be granted entitlement for his hip problem.

I would ask the committee to support my recommendation in this case and I would appreciate your careful consideration and guidance in this matter.

Madam Chairperson, I now turn the presentation over to Ms. Martha Keil our Assistant Director.

Ms. Keil: Thank you very much.

Mr. Bell: Ms. Keil, just to clear up a couple of procedural matters or technical matters before you get into the presentation.

First of all, you provided to members of the committee, I understand - with the knowledge and approval of representatives of the Board - what looks like to be a page out of that -- I thought it was out of that famous anatomy book Jones On Bones, but it is not, it is somebody else.

Obviously you think that this skeletal representation will assist the committee in understanding the medical evidence in this case?

Ms. Keil: Yes, for clarification.

Mr. Bell: Okay. Also, the material indicates that there may be or will be an addendum to this synopsis due to the fact that the Board had - at least as of the date the synopsis was prepared - not provided a response to either the 19(3) or specifically the 22(3) report in writing?

Ms. Keil: If I might address that briefly.

I think it is fair to say that the Board has taken the position in this case that it was desirous of more medical information and we have had a series of on-going memos since the 22(3), but they did not result in any firm position taken by the Board, except that it was not prepared to agree with the Ombudsman's conclusion and recommendations.

However, it would be fair to the Board to say that there has been on-going discussion and correspondence.

Mr. Bell: Are you aware today of what the Board's position is in this case?

Ms. Keil: Yes.

Mr. Bell: All right. And you have nothing to offer the committee in written form as to the Board's position?

Ms. Keil: No, I do not.

Mr. Bell: Well, all right.

I think in the circumstances, subject to the committee's direction, Madam Chairman, I will proceed with Ms. Keil in terms of the Ombudsman's case and leave the question of the response to the Board's position until after the committee has heard what that position is.

Members of the committee, and Ms. Keil, just a couple of comments. This is a war of opinions, medical in nature, so it is either five to four or five to five depending on what category you put an opinion of a former Appeal Board member in. It is not an easy case.

In simplistic terms, I think you want to just note some relevant facts. There was a fall which resulted in a bruised sacrum. The next event chronologically was the experience of hip pain by the individual with the ultimate diagnosis that the hip pain was caused by the existence of a disease called Legg-Perthes Disease which, prior to the fall, had been asymptomatic; although existing, it had been existing without any symptoms.

The question is whether the fall and the bruised sacrum rendered the unsyptomatic condition symptomatic thereby establishing a relation between the fall i.e., compensable accident, and the problems refrerrable to the hip.

Now, I know that is a simplistic statement, but I think therefore, nevertheless, it is an accurate line that the committee can adhere to.

Having said all of that, Ms. Keil, will you take the committee very carefully through the relevant facts including the medical opinions that you say support the Ombudsman's conclusions and recommendations and then explain those conclusions and recommendations with reasons?

Ms. Keil: Certainly.

I do not think your explanation was simplistic at all, Mr. Bell, because I was going to preface mine with one of those where the hip bone is connected to the backbone problem, but I think I will refer to your explanation as being somewhat better.

Mr. McLean: Point of order, Madam Chairman.

Madam Chairman: Yes, Mr. McLean?

Mr. McLean: I am interested in a question raised by Mr. Carrothers. Do you have a copy of the medical reports that were given on this case?

Ms. Keil: Yes.

Mr. McLean: In here we have a partial statement of what is in it, but I think I would like to see the reports from the doctor. Do you have copies of those?

Ms. Keil: Certainly.

Mr. McLean: Thank you.

Madam Chairman: Would it be acceptable, if during the break we make copies of those and distribute them to the members at two o'clock?

Mr. McLean: Yes.

Madam Chairman: Thank you, Mr. McLean.

Continue.

Ms. Keil: Whichever. At any time during the presentation I am more than happy to read the complete reports into the record which, in some sense, would be easier because then it will not require an anonymizing.

Mr. U started work with the accident employer in 1976. He was 19 at the time. He had had one previous job since he graduated from high school. He had, as Mr. Bell has noted,

the underlying condition of Legg-Perthes disease, which I will try very hard to explain in terms that I understand, let alone anyone else.

It is a condition that comes on in childhood. As I understand it, because of lack of blood, there is a collection of dead cells to the top of the hip bone. If you -- no, sorry, the top of the femur which joins to the hip bone on your diagram. It causes some misshaping of the bone.

It often does not cause problems during childhood when it comes on. It, as I understand from the literature, almost invariably will cause -- can lead to arthritis and similar problems much later on in life, but it is very common for there to be a long asymptomatic period.

Anyway, at the time that he was working for the railway, there is no evidence that he was other than completely asymptomatic.

He was carrying a bucket of bolts at the time of the accident and fell down a 20-foot embankment, rolling and hit the bucket at the bottom of the embankment striking his sacrum and coccyx, which is the tailbone basically, and was seen for that. There was noted to be severe bruising of the sacrum. X-rays at that time were only taken of the coccyx, sacrum and lumbar spine.

Now, severe bruising to that part of the body is customarily very, very painful and it also makes sitting and everything else quite difficult to do and it is quite frequently more the perniciousness of pain than any long-standing disability is what is most noticeable and, indeed, Mr. U did complain of pain.

As early as February of '87 he saw an orthopaedist who commented on the pain and also mentioned that it was radiating down the right leg.

It was represented that he be admitted to Downsvue, the Workers' Rehabilitation Hospital, and at that time x-rays in fact noted the deformed femoral head on the right side which is, in fact, indicative of Legg-Perthes disease.

Now, he was discharged in the summer of '77 as fit for his regular work and his benefits were cut off. However, his family doctor writes in October of '77 - a year after the accident - that Mr. U is still complaining of some pain and walking with a limp.

Now, I think it is important to state at this time that the majority of concern was being addressed to the back problem because that was where it was felt that the trouble lay.

Now, in retrospect, some doctors have commented that may not have been entirely accurate but hindsight is perfect and at the time everyone was looking at Mr. U's back.

Mr. Bell: This is a fairly critical issue in this case--

Ms. Keil: Yes, it is.

Mr. Bell: --because there is a record: "In 1977, July he was discharged as fit to return to work".

Ms. Keil: Yes.

Mr. Bell: There is a gap in terms of years, a fairly sizeable gap--

Ms. Keil: Yes.

Mr. Bell: --between that date and the diagnosis of symptomatic Legg-Perthes disease.

Ms. Keil: Yes, there is.

Mr. Bell: There is a reference on page 3 of the synopsis, paragraph 5:

"The worker's family doctor..."

Ms. Keil: Yes.

Mr. Bell: Am I correct that this is the only piece of evidence that goes to the issue of both the existence of symptoms referable to Legg-Perthes disease in 1977 and their continuation up to, I guess, 1980?

Ms. Keil: It is the most substantial piece of evidence.

Mr. Bell: Well, is there anything else?

Ms. Keil: Yes.

Mr. Bell: Is there anything else?

Ms. Keil: Yes, there is.

Mr. Bell: Okay. Well, let's stick with what this is.

Ms. Keil: Okay.

Mr. Bell: What do you have from Dr. E that confirms his diagnosis going back to 1976 and forward that he was suffering from Legg-Perthes disease, symptomologically?

Ms. Keil: Dr. E, the family doctor, was contacted by the Board's investigator during the time that the Board was actively investigating this file and the doctor stated to the Board's investigator that: Yes, there had been constant complaint of hip pain since the accident.

He had not noted them down in his record. However, he was quite explicit that they had occurred and he was also quite clear that there had been no complaint of hip problems prior to the accident. And that is the extent of his record.

Mr. Bell: What form does that opinion take in the Board's file or in the others, in the legal/medical opinion?

Ms. Keil: It is written down by the claims investigator and was passed as a document to the adjudicator for consideration.

Mr. Bell: What other evidence did you receive in support of the continuity of symptoms from '77 forward, referable to Legg-Perthes?

Ms. Keil: We have the worker's own evidence that he had experienced hip pain.

Mr. Bell: What form does that take?

Ms. Keil: His comments to the Board, his comments to us and his testimony at the Appeal Board hearing.

Mr. Bell: Okay. What else do you have?

Ms. Keil: We have - and I will admit that these are open to interpretation - we have the mention of the radiation of pain down the right leg which is not the back area, we have the mention of the limp in October of '77.

Now, it is possible, I agree, that the back pain could cause the limp, however, the right leg pain and the limping on the right side also could indicate the hip problem.

Mr. Bell: Also could indicate a little nerve problem too; couldn't it?

Ms. Keil: Yes, it could.

Mr. Bell: Anything else?

Ms. Keil: Something in - and I am sorry not to be more clear -- but, something in October of 1979 caused the family doctor to take x-rays of the pelvis and the hip joints which had not been done until that time, as I said, because attention was focused on the back.

X-rays up until that time had tended to be of the lumbosacral spine and, in October of 1979, x-rays of the pelvis and hip joints were requested.

Mr. Bell: But that only showed the presence of the disease?

Ms. Keil: Yes.

Mr. Bell: It did not determine whether they were symptomatic at the time?

Ms. Keil: No.

Mr. Bell: Okay. Can we assume then that that is all of the evidence going to the issue of existence of and continuity of the symptoms referable to the disease up to 1976?

Ms. Keil: Yes.

Mr. Lupusella: I have a supplementary question based on our counsel's questions.

Do we have the x-rays made at that time which would indicate that there was something wrong with the hip?

Ms. Keil: We have x-rays that demonstrate that the Legg-Perthes is present.

Mr. Lupusella: Okay, thank you.

Mr. Bell: Okay.

Madam Chairman: Mr. Bell?

Mr. Bell: We want to continue with the facts, et cetera, at the point where I interrupted you.

Ms. Keil: Certainly. Now, because of the complaints of on-going pain, the Board arranged for Mr. U to see Dr. H.

Mr. Bell: When?

Ms. Keil: In February of '78.

I think it is entirely accurate to characterize Dr. H's report as unsympathetic to the worker's problems. He does not find any physical disability and suggests that he go back to work.

Mr. Bell: Where is Dr. H referred to in either the synopsis or your report?

Ms. Keil: Just a moment. I do not think he is in the report.

Mr. Bell: I do not think he is in anything.

Ms. Keil: No.

Mr. Bell: Is there a reason for that, other than it was not a favourable opinion?

Ms. Keil: He is not absent because his opinion is unfavourable. If that were the reason I would not have brought him up now.

He is not in the report because he never addressed any opinion toward the hip problem or the likelihood of relationship. He was never asked to do that and he had no knowledge of it, so he was not used.

Mr. Bell: So your position is that nothing he said is relevant to this issue?

Ms. Keil: The Ombudsman does not consider his evidence relative. However, it is in the, I believe, reference -- no, it is not. Reference is not even made to him in the Appeal Board decision.

Madam Chairman: Mr. Charlton?

Mr. Charlton: Just a question on that issue.

I would assume from what you have said - and you can correct me if I am wrong - that he was seen in...?

Ms. Keil: February, '78.

Mr. Charlton: February of '78 by Dr. H and the doctor focused, at that point, on the original back injury and could find no findings--

Ms. Keil: That is right.

Mr. Charlton: --in the region of the sacrum to cause the pain that the claimant was complaining of.

Is that essentially what his report does?

Ms. Keil: Yes. Now, in the interest of total completeness, the worker has stated that he complained of hip problems to the doctor who paid no attention to him and the doctor has reported that straight-leg raising was normal and, in the jargon, that would indicate that one could assume that there was no problem with the hip because there was no restriction of straight-leg raising.

So that is the report in its entirety.

Mr. Bell: What, H's?

Ms. Keil: Yes.

Mr. Bell: Well, page 8 of your material, the interview summary, which is one of your documents--

Ms. Keil: Yes.

Mr. Bell: --made contemporaneous with the making of the complaints in quotes, in the fourth paragraph on the first page attributes an opinion to Dr. H of: "no disability".

Ms. Keil: Dr. H, yes.

Mr. Bell: Now, did you already tell us that? If so, I apologize for wasting the last 15 seconds.

Ms. Keil: No, I am sorry.

Mr. Bell: I think we would like to see Dr. H's, whatever it is.

Ms. Keil: Certainly.

Mr. Bell: Not now, but if you could just prepare copies over the lunch hour and I will tell you why, because your case builds on a continuity of symptoms from '76 forward. This guy is an orthopod--

Ms. Keil: Yes.

Mr. Bell: --and if your guy was experiencing and complaining of symptoms, it is interesting at least to have a comment of "no disability" after an examination.

Ms. Keil: Yes.

Mr. Bell: Okay, thanks.

Ms. Keil: The other reason that we did not put much stock in Dr. H's report -- well, we did not, and I think I should explain why.

Mr. Bell: Sounds familiar, that is all.

Ms. Keil: Is because he saw Dr. H on only one occasion and the next orthopaedist that he saw he continued to see over the next few years, but I would be happy to supply the evidence.

Mr. Bell: When did he see the next orthopod?

Ms. Keil: He started to see Dr. B in August of '78 and this is still, I would like to remind the committee, we are

focusing on the back complaint, that is the primary reason.

And Dr. B states that Mr. U has discogenic back pain and that the x-rays of the lumbar spine are unremarkable.

Now, during this period he also worked for six months at a hotel.

Mr. Bell: And you say Dr. B first examined this person in 1978?

Ms. Keil: Yes.

Mr. Bell: Because I must confess, I read paragraph 2 of the synopsis as Dr. B first seeing this person in October of 1980?

Mr. McLean: Is this the family doctor?

Mr. Bell: No, he is the orthopaedic specialist.

Ms. Keil: Yes.

Mr. Bell: It seems that Dr. B first diagnoses the Legg-Perthes in December 1980.

Ms. Keil: Yes, but he had been seeing the gentleman since December 1978 and that is where I say the hindsight issue tends to come in because Dr. B was not overly sympathetic.

Mr. Bell: Dr. B...?

Ms. Keil: Dr. B was not overly sympathetic to the question of back pain and back problems. However, when he noted the complaints of pain to the right leg and looked at the x-rays of the right hip, he started to focus on the Legg-Perthes as being, in fact, what was important in the man's on-going problems rather than the back.

Mr. Bell: Okay.

Ms. Keil: Okay. Now, December 17th, of 1980 Dr. B comments as follows:

"Recent x-ray examination of the right hip reveals what appears to be previous Legg-Perthes disease. This man still has back pain and also limitation of movement of the right hip area.

This man emphatically reports that he had no problem with his hip prior to his fall. It appears that he does have evidence of previous Legg-Perthes disease which became symptomatic at the time of his fall on October 25, 1976."

And a few months later Dr. B suggests a referral to another orthopaedic specialist Dr. C. At this time the issue is also raised with the Board and the Board's doctor. Dr. I simply says that the problem is, by its very nature, non-compensable.

Now, in June of 1981 the worker visits Dr. C who says:

"He walks with an obvious Trendelenburg gate. Movements of his hip were restricted and there was one-half shortening of the lower extremity.

He is appealing his claim with the Board and I think quite likely it should be allowed on an aggravation basis."

A month later he goes back and sees Dr. B again - and I am reading the quotes now because of the interest members have expressed in what exactly was said:

"Basically this man has complained of back pain and painful coccyx since his injury in October, 1976. He later seemed to develop pain in the right hip area and he claims there was no problem prior to the injury to his hip.

The worker says that his back became bothers him more than the hip, but there was discomfort in the hip right from the injury.

Certainly, in my opinion, the x-ray findings are old in nature and are not a result of the reported injury of 1976. They have the typical appearance of Legg-Perthes disease which is a developmental abnormality, however, the accident itself may have made this hip problem become symptomatic.

In summary, this man is complaining of back pain and right hip pain.

Initially he was seen more for the back pain and the painful coccyx. He seemed to develop more complaints about his right hip later on.

It certainly seems that the injury reported may have contributed to his hip pain and caused it to become symptomatic, but the basic problem of the hip revealed by x-rays is very unlikely to be caused by the accident. The problem with the hip has been long-standing."

Which goes to the nature of Legg-Perthes disease.

Mr. Bell: This is the February, '82 opinion?

Ms. Keil: No, July, '81 by Dr. B.

Mr. Bell: Before the operation?

Ms. Keil: Yes.

Mr. Bell: Okay.

Ms. Keil: In a follow-up report three weeks later Dr. B states:

"I feel this man's right hip became symptomatic and was aggravated by the injury in 1976."

Four days later in another report he states:

"The worker was sent to Dr. C in Toronto who felt that x-ray changes were compatible with old Legg-Perthes disease, however, he feels, as I do, these symptoms became apparent from the time of the injury."

In other words, there was a direct cause and effect between the injury reported when he slipped on October 25, '76. This made his hip symptomatic and caused pain."

And then in October of '81 an arthrodesis of the right hip with a cobra-head plate was carried out by Dr. B and I cannot clarify that too much, but that was the nature of the operation.

Mr. Bell: He got a new hip joint?

Ms. Keil: Yes. I am sorry if this is tedious. I keep reading the reports of Dr. B so that the committee can see that he remains convinced of the correlation and that this was not simply a one-shot report that he issued.

In January of '82 he states:

"The injury and fall at work certainly started the pain in the right hip area and this led to the eventual surgery on his right hip."

In February of '82, he introduced another argument which is:

"I think we are considering that perhaps his abnormal gait at first, which was an attempt to favor and protect his back, may have put added strain on his affected right hip and made this become symptomatic."

Now, those are two distinct arguments that aggravated the Legg-Perthes and that secondly the sequela to the back injury i.e., the soreness, aggravated the hip injury.

However, in both cases, if they were accepted, they would constitute aggravation and compensation would be in order, if they are accepted.

Mr. Bell: Are you about to move beyond February, '82?

Ms. Keil: Yes.

Mr. Bell: Well, can you go to paragraph 4 at the bottom of page 2 and I have got to tell you that is the paragraph that gives me the greatest difficulty.

Ms. Keil: Okay.

Mr. Bell: I do not know what it means and I think you are going to have to help us with Dr. D.

Dr. D, as paragraph 3 indicates, puts something in writing referable to this claim?

Ms. Keil: Yes.

Mr. Bell: And you do not quote him except for the part referable to the schedules, but you do paraphrase him as saying:

"The Board would not be justified in accepting the claim because there was no documentation for up to nearly four years after the incident.", et cetera, et cetera.

Ms. Keil: Yes.

Mr. Bell: Page 2 of the synopsis -- I just read the bottom of paragraph 3.

Ms. Keil: That is true.

Mr. Bell: Just a minute. You then go on to say in paragraph 4 that:

"...Dr. B... could not disagree with any of the comments put forward by Dr. D but that he still thought that the injury had, perhaps, aggravated his right hip condition."

Ms. Keil: Yes.

Mr. Bell: Now, I tell you I do not know whose language that is, but do you think perhaps the fact that you cannot disagree with somebody who says it is not compensable, would tend to water things down?

So can you tell us - maybe it is not appropriate now - but can you tell us what it is precisely that he said and

what precisely it was that he said he was not agreeing with?

Ms. Keil: Yes, I can, if you will just give me one moment to actually read from the Board doctor's memo, assuming I can find it.

Madam Chairman: I think what we will do is stop here and adjourn and maybe, when we resume, you can come back with Dr. D's reports and Dr. B with reference to this.

Ms. Keil: With reference to this question, I have it, if you want to know now.

Madam Chairman: I think it better when we resume and we can think about that and start off with the opinions.

If we can adjourn now and start again at two o'clock.

Luncheon recess at 12:35 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

THURSDAY, JANUARY 21, 1988

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
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Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:

Lipsett, Ron (Grey L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Keil, Martha, Assistant Director, Investigations
Hill, Dr. Daniel G., Ombudsman
Meslin, Eleanor, Executive Director
Robert, D'Arcy, Investigator

From the Workers' Compensation Board:

Glasberg, Irwin, Executive Director, Review Services Department
Queen, David, Ombudsman Administrator, Review Services Department
Macfarlane, Dr. Ed, Senior Medical Review Consultant, Pension and Consulting
Branch

ERRATUM: In this transcript, Mr. McFarlane should be Mr. Macfarlane.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, January 21, 1988

The committee met at 2:08 p.m. in committee room 2.

Madam Chairman: If we can call the meeting back to order again.

We were dealing with the case of Mr. U, if we could resume.

I think we left off with Ms. Keil referring to Dr. D and Dr. B and their medical comments with respect to seeing Mr. U. If you can continue on that.

Ms. Keil: Yes.

First, I hope the members have gotten the copy of Dr. H's report. We did not have time to anonymize all of the medical documents on point over lunch and if committee members want them we can undertake to do that, otherwise I will probably just continue to read sections of the report into the record, if that is all right.

Madam Chairman: Mr. McLean brought this forward.

How do you feel about that response?

Mr. McLean: I am not satisfied, because seeing and reading this copy that we have already got, it certainly indicates to me that we should be looking at all the doctor's reports because there are parts of it in your evidence to your favour and, not reading it all, there are some that are maybe not to your favour.

So I think that I would like to see the full reports on it.

Madam Chairman: Mr. Philip?

Mr. Philip: The procedure we have always used -- and the reason we have two sides before us is that the requirement is for each side to bring out those points or that evidence on the other side which does not help their case.

If we are going to start to what amounts to an investigation of the case, then I submit to you, Mr. McLean, that that is not the role of the Ombudsman Committee.

If we get into that kind of role, then you might as well give up your seat in the Legislature and do nothing but

reinvestigate Ombudsman's claims.

Our role surely is to look at the evidence. If there is something that would not help the Ombudsman's case, then the Workers' Compensation Board is here to point that out and at which time then we can look at that particular document.

But I am not prepared to go and do a reinvestigation of the whole case. It is just an absurd kind of proposition.

Madam Chairman: Is there any more discussion on this point?

Would it be satisfactory if they were prepared and presented for our deliberations later?

Mr. McLean: Sure.

Madam Chairman: Would you be able to do that?

Ms. Keil: If you want them later today, someone is going to have to go out and anonymize them now and then I will not have them for reference.

If you want them Monday, for instance, or Friday, that is no problem. But I would have to give them away in order to have them anonymized for this afternoon.

Mr. McLean: I do not think it is necessary. The point I wanted to make is that I believe they are important evidence and whether it comes from your side or the other side, I think whoever -- and I probably put the blame on the compensation for not producing evidence from those reports. I think it is important, but I do not think it is necessary to go through that for today.

Madam Chairman: Mr. Bell?

Mr. Bell: May I make a suggestion? Can we put that question again when we finish the consideration of this case and have heard from both parties in all circumstances - and whether, to what extent, any of the reports are of particular interest to the members and consider it necessary for the purpose of deliberation - rather than disrupt their file now and send somebody out to anonymize now.

If that is acceptable, I would think that is a good way to proceed.

Madam Chairman: Mr. McLean?

Mr. McLean: (inaudible)

Madam Chairman: Thank you very much.

Please continue.

Ms. Keil: Also, just as a point of clarification, I said earlier, I told Mr. Bell that our Ombudsman report did not refer to Dr. H. In fact, we do cite Dr. H on page 44 of the report.

Mr. Bell: That is not your error, that was probably mine.

Ms. Keil: No, that was mine because I said that we had not.

Mr. Bell: Where is it?

Ms. Keil: At the top of page 44 where the Ombudsman is discussing the employer's submissions:

"Also, it should be noted that two of the doctors cited by the company, Drs. A and H, examined Mr. U in 1977 and early 1978 for a back disability."

Mr. Bell: Yes, you are right.

Ms. Keil: I am sorry that I was wrong.

Mr. Bell: What is also wrong, though, is the next sentence on that page.

Ms. Keil: Which is...?

Mr. Bell: "Neither doctor reviewed the x-rays..." We have a report from Dr. H that he reviewed the x-rays.

Ms. Keil: He reviewed the report, I believe, not the x-rays.

Mr. Bell: I am sorry, I am wrong twice. Okay, I will shut up.

Mr. McLean: Index E?

Mr. Bell: Sorry?

Mr. McLean: Index E?

Mr. Philip: F.

Mr. Bell: F.

Mr. McLean: I am sorry.

Ms. Keil: I would like to continue.

I have one more point of clarification from something I

said this morning and then I promise that I am finished.

When we were talking about evidence of hip problems between '77 and '80, and I mentioned complaint of pain, and Mr. Bell quite rightly pointed out that that could also indicate pain radiating into the right leg and he indicated that that could be evidence of nerve root irritation.

Well, that is true. However, if you do in fact refer to Dr. H's report where he talks about straight-leg raising, one of the primary purposes, as I understand it - and I stand to be corrected by the Board - one of the primary purposes of straight-leg raising is to see if, in fact, there is nerve root irritation because when you do the straight-leg raising it tests for that, and I believe his report indicates no such thing existed.

So it would seem to suggest that nerve root problems were not present.

Mr. Bell: It is also suggested there was no pain present either.

Ms. Keil: During straight-leg raising, yes.

Mr. Bell: During anything. The first sentence on the second page is something you are going to have to address.

Ms. Keil: Yes. I wanted to also address that other point.

Mr. Bell: Thank you.

Ms. Keil: Okay. Now, to get back to where we thought I was earlier.

When the question of Legg-Perthes disease came up and the question of surgery, the matter was referred to Dr. D, a Board doctor for consideration, and I would like to read into the record his complete report.

"I reviewed this situation and I would simply note that..." You have that on record, that is all right.

"The fall under this claim occurred on the 25th of October, 1976, and all complaint and medical reporting focused upon the lower sacrum and coccyx. An x-ray taken at Downsvew on the 6th of July, '77, of the sacrum coccyx also must have shown the hip joint and lead to the report by the radiologist recognizing the problem in the right femoral head and secondary problem in the acetabulum. The medical reporting clinic doctor makes no notation concerning this. Then at the request of the appeals people, he was seen by Dr. H on February 18th, '78. On the letter sent to

Dr. H, copies of all documentation was sent and I would have to assume that this included the x-rays report from H&RC. Dr. H reports he does have a femoral head problem on the right side but he does not have any associated complaints. Then the fact of a right hip joint problem was first recognized by the attending doctors in North Bay in the period of October to December of 1980 as reflected in that correspondence.

I note what was said by Dr. B in his letter to the lawyer, dated the 7th of July, 1981, and I also note the consultation note from Dr. C, dated the 22nd of June, '81. "Despite these two opinions, I cannot myself feel that we would be justified in accepting this hip joint on an aggravation basis. There is no indication at all from the clinical documentation that any complaints were associated with it up to nearly four years after the incident and this despite the fact that one orthopaedic surgeon seeing him was aware of the x-ray change and comments specifically on the matter."

This is the entire memo from Dr. D. It should be noted that he did not at that point have the benefit of the family doctor's comments about pain since 1977.

Mr. Bell: Can you now know tell us precisely what Dr. B agreed with or, I guess in the language of paragraph 4, could not disagree with?

Ms. Keil: Yes. Just a moment. I want to get the right -- okay. The memo by Dr. D was sent to Dr. B and he wrote as follows:

"This man, as you know, fell and injured his back on October 25, 1976. I must admit I cannot disagree with any of the comments put forward by Dr. D. The only comment I have is that perhaps his back problems and his initial radiation of pain into the right leg region made him walk in an abnormal gait, and perhaps this aggravated his right hip condition. However, I must admit this is rather hypothetical and it is true that as far as I know, Mr. U did not complain of pain in the right hip during the initial visits to me. I have discussed this with Mr. U and he does tell me that his right hip was always hurting but it seemed to be overshadowed by his back pain and coccyx pain in the coccygodynia. In summary, I cannot honestly disagree with the comments put forward by Dr. D. However, it is possible that Mr. U did have pains in the right hip initially and they may have been overshadowed by the more intense pain at first in the back and also in the coccyx. I also thought that perhaps his abnormal gait, at first an attempt to favour and protect his back, must have added strain on the affected right hip and made him asymptomatic. I agree these two

suppositions are difficult to actually prove. I still personally feel that Mr. U. should receive entitlement from the Workmen's Compensation Board as a result of this injury."

Mr. Bell: Could we have a copy of that please when you anonymize it?

Ms. Keil: Yes.

Mr. Bell: You recall the reference that was made yesterday to the last case of certain memoranda submitted by Dr. McFarlane?

Ms. Keil: Yes.

Mr. Bell: Would you agree with me that Dr. D's opinion falls in the same category, whatever that category is?

Ms. Keil: Of conjecture, yes.

Mr. Bell: Something less than what one might expect or hope to receive from a doctor in terms of a definitive opinion?

Ms. Keil: Yes.

Mr. Bell: Am I also correct that for the first time a doctor -- and he is a specialist; is he not?

Ms. Keil: Yes.

Mr. Bell: To put another theory on the table referable to the hip symptoms and that is that the abnormal gait perhaps could have aggravated it?

Ms. Keil: Yes.

Mr. Bell: Help me and the committee, what does the Ombudsman say ultimately is the cause, the injury, the fall and the bruised sacrum or the abnormal gait as a result of that fall and injury?

Ms. Keil: In terms of an injury, it is not necessary to distinguish between the incident and the sequela, so we are not saying that either the gait produced by the back fall or the back injury is necessarily -- that it necessarily need be one or the other.

Mr. Bell: Sorry, you do not have that luxury, with respect.

What is the Ombudsman's conclusion of the evidence that you received in respect of that investigation, that the fall, the bruising of the sacrum caused the aggravation, or

that the theory of the abnormal gait as a result of that injury caused the aggravation?

Ms. Keil: Both Dr. B and Dr. C have advanced both theories and I have not --

Mr. Bell: Okay. In fairness to you, if your position is: We do not prefer one or the other, fair enough.

Ms. Keil: I am sorry, we do not prefer one or the other.

Mr. Bell: Does it make a difference?

Ms. Keil: I do not think so. With respect that it does, because it seems to me that if you are going to say the immediate trauma to the back precipitated the hip injury, then that is compensable.

If the injury to the back produced an abnormal gait which in turn precipitated the Legg-Perthes disease, then that is compensable.

If both operated to make the Legg-Perthes disease symptomatic, then it is compensable. That being so highly a medical matter, and I admit, as the doctors say, conjectural, we do not have a preference.

Mr. Bell: Can I suggest something to you --

Ms. Keil: Yes.

Mr. Bell: -- what appears to happen. Dr. B and others put forward opinions of the onset of the Legg-Perthes symptoms prior to Dr. D getting into the act. Dr. D put forward a report that Dr. B at least can't refute, and he says: "I do not refute it."

However, this is my theory: So as a result of what Dr. D said and does, Dr. B takes it in a different direction. You are nodding your head "yes"?

Ms. Keil: Yes.

Mr. Bell: After Dr. B's February 1982 theory, the only available medical explanation of the symptoms and the disease and the injury is that put forward by Dr. D?

Ms. Keil: And Dr. C.

Mr. Bell: Isn't Dr. C now overshadowed or overridden by Dr. D?

Ms. Keil: Dr. D later attends the Appeal Board hearing.

Mr. Bell: I am sorry, I stand corrected.

Can we just flip to Dr. H and the opinion that the committee members now have because it is referred to in Dr. B's report and also Dr. D's report that you just read.

As a matter of fact, Dr. B, if I remember your reading correctly, makes specific reference to the first sentence on the second page of H's report.

Ms. Keil: Yes.

Mr. Bell: Just so that I fully understand what that means to you and to others, he zeros in on the Legg-Perthes disease, the femoral head problem. So something in the material that H reviewed and the examination of the complainant permitted him to identify the problem; correct?

Ms. Keil: Yes. If I might --

Mr. Bell: The x-ray reports?

Ms. Keil: The x-rays report from Downsvieview showed it.

Mr. Bell: Now, H makes a finding that he does not have any associated complaints?

Ms. Keil: Yes, and the worker directly contradicts that.

Mr. Bell: Where?

Ms. Keil: In his evidence to both the Board and to us. He has stated that he told Dr. H about his hip problem, hip pain, and he was -- well, in his words, he was ignored. We neither accept nor refute that. It is just part of what is available.

Mr. Bell: You neither accept or refute what?

Ms. Keil: His statement that the doctor did not pay any attention to his complaint.

Mr. Bell: You neither accept nor refute what Dr. H says in that sentence?

Ms. Keil: The statements are mutually exclusive.

Mr. Bell: Does that mean you discount them both or count them both?

Ms. Keil: It means we count them both. We have no reason to disbelieve.

Mr. Bell: Okay. Either?

Ms. Keil: Yes. But it makes it very difficult to assess what weight to give it.

Mr. Bell: I am going to let you finish reviewing the medical evidence and then explain your opinions, but do you agree with me that this is a tough one?

Ms. Keil: Absolutely.

Mr. Bell: Do you agree with me that it is a very close one?

Ms. Keil: I agree that it is close.

Mr. Bell: I have no further questions.

Do you want to just continue with the review of the evidence that you are relying on and an explanation of the opinions, et cetera?

Ms. Keil: Okay. Where were we? Dr. B's report where he first suggests the abnormal gait is February of '82.

In July of '82, there is a further memo from Dr. D, the Board doctor, and I will read it more or less in its entirety so that it gives a complete picture of the evidence.

"Legg-Perthes is a vascular necrosis..." which means a collection of dead cells from lack of blood.

"...of the head femoral which occurs during childhood. On other occasions, it does not cause sufficient symptoms to lead to its recognition at the time and it comes to light later on and the distortion of the femoral head leads to very early onset of arthritis in the hip joint. What we have to attempt to resolve in this claim is whether or not the incident of the 25th of October, '76, caused a significant aggravation of this pre-existing, but apparently asymptomatic problem. I know that Dr. A's consultation of the 18th of February, '77, says that pain tends to radiate to the right leg. I cannot feel that we can reasonably use this as an indication of right hip injury at the time as many severe contusions of the coccygeal region have radiating pain in one or the other leg."

Then in August of '82, Dr. B again writes:

"That as a result of the injury, the patient did develop pain in the right hip and ultimately this led to surgery on the right hip. Again, it is quite conceivable that this man would have gone for an indefinite period of

time without any problem in his right hip if there have been no injury."

There is then an appeal Board hearing in '83 at which Dr. C. attended, and he stated:

"An injury such as occurred on the 25th of October, '76, could aggravate Legg-Perthes disease and that the attending doctors have been more concerned with the coccygeal area and have not performed detailed medical examinations of the worker's right hip."

This is also noted in the Appeal Board decision on page 11 of your material.

Dr. C. commented in a follow-up letter regarding his attendance at the Appeal Board hearing.

"I have gone over again very carefully with Mr. U the details of his accident. He is adamant in saying he tumbled 20 feet down an embankment doing a series of backward somersaults and coming to rest with his back against a drum. While it is true the medical attention was focused at first on the injury to the back, I think it is extremely probable that it would be impossible to have the injury he describes without also wrenching his hip, which no doubt had loss of motion from the pre-existing condition. I thus find it difficult to accept Dr. D's statment. I suppose therefore it would be worthwhile asking Mr. U to ask Dr. D if he thinks Mr. U could have the injury he describes without wrenching or bruising an already bad hip."

This was a submission made to the appeal Board. There is no indication that that was followed up on.

The Appeal Board in its decision, as you have on page 11, concluded:

"The preponderance of medical evidence establishes that the right hip disability diagnosed as Legg-Perthes disease is not related to the accident of October 25, 1976. "

The Appeal Board's decision does not, in my mind, really address how they weighed the evidence to come to that conclusion. They cite the opinion of the Board's surgical consultant, but they do not really deal with how they weigh the evidence of the orthopaedist who attended at the hearing or Dr. B.

At that point, Mr. U. came to our office for the first time and we commenced an investigation. Along with our investigation, we received a report from another specialist, dated the 25th of May, 1984 and it says:

"I have reviewed Mr. U's files with specific reference to your" --

Mr. Bell: What alphabet letter is he?

Ms. Keil: I am sorry, this is Dr. F.

Mr. Bell: Paragraph 6 of page 3 of the synopsis?

Ms. Keil: Yes.

Mr. Bell: And following?

Ms. Keil: Yes.

"I have today reviewed Mr. U's file with specific reference to your questions regarding the accident and injury to the hip and Legg-Perthes disease evident radiological. I find the argument and summary of Mr. U's lawyer quite clear and rather interesting and I am at a loss as to why his appeal was still denied. Legg-Perthes disease is a disease that usually begins in childhood and if undetected and untreated can lead to degenerative arthritis in the hip joints. In other words the hip joints are very susceptible to the evolution of further disease. If any injury occurs at a given point in time, even though the individual may have been perfectly healthy and normal up to that point, the injury may aggravate or initiate the degenerative process in the hip. I believe this is what occurred in Mr. U's case. It seems to me that Dr. D's position that the injury is non-compensable because it is related to the hip problem and the hip problem is not adequately documented in the initial phase of his injury and treatment is a rather poor argument. It has always been my contention that the patient should be given benefit of the doubt, and it seems to me that with the opinions of the orthopedic specialists carries enough doubt in this case to find in favour of the patient. However, it appears the Board is not willing to do so. I must agree that Legg-Perthes disease is not related to the accident. However, the reverse is truth; that the accident can aggravate the degenerative process that occurs as a result of Legg-Perthes disease."

Mr. Bell: That is a paper review; isn't it?

Ms. Keil: Yes.

Mr. Bell: He did not examine the patient?

Ms. Keil: No, he did not.

Mr. Bell: Or speak to the patient?

Ms. Keil: No, he did not. The doctors cited, Dr. D, Dr. I and Dr. F did not ever see the worker.

Mr. Bell: All right. We haven't got an I.

Ms. Keil: I am sorry?

Mr. Bell: Did you say Dr. I?

Ms. Keil: Yes.

Mr. Bell: We haven't got an I. Not in my legend, anyway.

Ms. Keil: Just a second, sorry. I referred to him earlier. He was the first Board consultant that simply said the condition is by its nature non-compensable, and where is he cited?

Sorry. Well, outside of me, we cannot seem to find anybody who is referred to him either, the Board or ourselves.

Mr. Bell: Okay.

Ms. Keil: Okay. We submitted that evidence to the Board as new evidence, and if you follow through your material you will note that in December of '84 the Board decided that reconsideration should be granted.

We then have a second Appeal Board decision dated June 18th, '86.

In between the hearing and the decision, it was decided to refer Mr. U to another physician, one that was mutually acceptable to the Board and to the worker. The meat of Dr. G's report states:

"The problem here is that he had asymptomatic Legg-Perthes disease prior to the accident. It is possible the accident precipitated symptomatology and previous asymptomatic joint, at the same time, he probably would have developed symptomatology eventually anyway."

The appeal Board concluded from that that the development of the workers symptoms in his hip were coincidental and not related to his accident of October '76.

Mr. Bell: While you are on the medical referee issue, there is a comment made both in the report and in the synopsis that you do not know why that was done. Do you have any more comment to make in that regard?

Ms. Keil: Why he was referred to the --

Mr. Bell: I guess the comment about the appointment of a medical referee midway through the Ombudsman's investigation.

Ms. Keil: It was the position of office that the weight of the medical evidence, as it existed at the Appeal Board hearing, was sufficient to have decided in Mr. U's favour and it wasn't necessary to get another opinion.

Mr. Bell: You do not make issue with the appointment of the medical referee?

Ms. Keil: No.

Mr. Bell: Okay.

Mr. Charlton: Did I understand you correctly that you said the decision was made between the time of the second Board hearing and the decision? In other words, it was part of the second Board hearing process that the referee came out?

Ms. Keil: Yes. We did not --

Mr. Bell: You do not take issue of the referee?

Ms. Keil: No.

Mr. Bell: I misread the report then.

Ms. Keil: We do, however, take issue with the fact that the Appeal Board does not appear to have done anything with the report from Dr. G, and what we infer from that is that the Board decided it had no compelling argument to make either for or against. In its comments, the Appeal Board says it notes and accepts the report from Dr. G.

Mr. Bell: Can I ask you something very simply. The recommendation, which is the last paragraph of page 44 of the material, page 6 of your report, says "that Appeal Board's decision should be revoked..."

What decision are you referring to?

Ms. Keil: Oh, the last, the '86 decision.

Mr. Bell: What happened in the meantime?

Ms. Keil: Pardon?

Mr. Bell: When did you change direction, because you have got a 19(1) in here that says you are investigating another decision.

Ms. Keil: Yes, we have a second 19(1).

Mr. Bell: Okay. We just do not have it.

Ms. Keil: That is an oversight.

Mr. Bell: But there is one?

Ms. Keil: Yes.

Sorry, we do, it is page 24. "The Appeal Board, in its decision dated June 18th, '86, was unreasonable..."

Have you got that?

Mr. Bell: Just a minute. It is just in different form than the one at page 13.

Ms. Keil: Yes.

Mr. Bell: All right. Sorry.

Ms. Keil: Okay.

That is, I am thankful to say, the end of the medical reports.

Mr. Bell: Why is the decision unreasonable?

Ms. Keil: Because our office believes that the weight and preponderance of medical evidence is in favour of entitlement.

Mr. Bell: For the reasons that you have already reviewed?

Ms. Keil: Yes.

Mr. Bell: Can you just clear something up in terms of this latter matter that gets cited at page 5 of the synopsis where you tally the medical profession.

Ms. Keil: Yes.

Mr. Bell: "There are four orthopaedists and the family doctor supporting the worker's contention." Can you give us the initials?

Ms. Keil: Yes. B, C, F and G.

Mr. Bell: That is the orthopaedists and the family physician is E?

Ms. Keil: Yes.

Mr. Bell: And then there are two orthopaedists, who were unaware of his hip condition under discussion, and two Board doctors and a member of the former Panel?

Ms. Keil: Yes.

Mr. Bell: What initials are they?

Ms. Keil: They would be Dr. A, Dr. H, and the Board doctors would be Dr. I and Dr. D.

Mr. Bell: D?

Ms. Keil: D, yes.

Mr. Bell: Does the former member of the Appeal Board doctor have an initial?

Ms. Keil: No.

Mr. Bell: Was he a doctor or she a doctor?

Ms. Keil: Yes, he was and I am sure he still is.

Mr. Bell: It is not correct though, is it, to say that Dr. H was unaware of the hip condition?

Ms. Keil: I do not know --

Mr. Bell: Well, I do.

Ms. Keil: -- whether this sentence indicates that he was aware that there was Legg-Perthes or there was an abnormality.

Mr. Bell: But I thought you and I agreed that the statement that he does have a femoral head problem related to the Legg-Perthes Disease as described in the July '77 radiologist's report?

Ms. Keil: I think that is not unlikely. I am not sure that it means that. I know it means that he recognizes that there is an abnormality.

Mr. Bell: He was aware of something referable to that hip?

Ms. Keil: Yes.

Mr. Bell: What it was you are not certain.

Ms. Keil: The reason I am not certain is because those x-rays were available since 1977, but the mention of Legg-Perthes only came up in 1986 by an orthopaedist who had had an opportunity to see those reports. So I am not sure

if it was mentioned, but it is not impossible or even unlikely.

Madam Chairman: Do you still have more to your presentation at this point?

Ms. Keil: I was going to sum up and then I was finished.

Madam Chairman: Are there any questions at this point from the committee or do you prefer...

Yes, Mr. Charlton.

Mr. Charlton: I have several questions which relate to items to which you referred and then made no comment about.

Is there any indication of Legg-Perthes in the other hip?

Ms. Keil: No, there is not.

Mr. Charlton: I am going to come back at the comment and I can't remember the exact quote, but there was a comment by one of the doctors about the pain radiating down the right leg?

Ms. Keil: Yes.

Mr. Charlton: The comment went something like: It is quite normal in the case of a --

Ms. Keil: That was Dr. D referring to Dr. A's report of 1977.

Mr. Charlton: He said something to the effect that it is quite normal with a sacral injury for pain to radiate down.

Ms. Keil: Into one or the other leg.

Mr. Charlton: Either leg?

Ms. Keil: Yes.

Mr. Charlton: One or the other leg, right.

It just struck me if there were no indication of the same kind of a hip problem in the other leg, whether anybody put the question to any of the doctors why the pain route would have been in the right leg where the hip problem was as opposed to having gone anywhere else, like down the left leg.

Is that just too much of a coincidence? Did anybody

discuss that with any of the physicians?

Ms. Keil: That is not explained in any of the reports.

Mr. Charlton: In the opinion of the orthopaedists, which basically support your case, were any of them able to cite other cases that they were aware of where -- they all seemed to be saying that an accident can trigger it.

What kind of background evidence do they have for that or do we know?

Ms. Keil: We do not know. They say: I have seen this before or this is common. They relate their comments specifically and solely to Mr. U.

Mr. Charlton: Do they often use words like "this is common", though?

Ms. Keil: No, they do not.

Madam Chairman: Finished, Mr. Charlton.

Any further questions before Ms. Keil sums up?

Please continue.

Ms. Keil: Thank you.

We think it is a difficult case and we acknowledge that there is medical opinion on both sides, and it is always easier to deal with a simple case rather than an aggravation or this did this to that and this did this to the worker.

However, what the Ombudsman think is compelling in this case is that the orthopaedist who saw Mr. U for four years was of the opinion -- I am sorry, that would be Dr. B. He first saw him in '78 and continued to see him well into '82 and did the surgery.

Mr. Bell: Is it the evidence and opinion of Dr. B the one -- the medical opinion and evidence upon which the Ombudsman relies most heavily?

Ms. Keil: Yes. I think I was going to go through and give weight to which we gave the greatest credence and why.

Mr. Charlton: Is Dr. B also the one that made the submission to the Appeal Board hearing?

Ms. Keil: Dr. C.

Mr. Charlton: That was Dr. C.

Ms. Keil: We give great weight to Dr. B because he had

seen the worker for the four years, from '78 to '82. He did not seem to have a problem with the continuity issue and he was seeing him in that period. He did the operation. He is a respected orthopaedic specialist. We find that evidence compelling.

We find the evidence of Dr. C persuasive in that he saw the worker on a number of occasions and felt strongly enough to attend at the Appeal Board hearing. This is not common practice. It is not completely rare, but it is not usually the case of an orthopaedic specialist to attend at Appeal Board hearings to give evidence and to present a written follow-up report reiterating his position.

That doesn't mean that his evidence is necessarily beyond criticism, but it does argue that he believed quite strongly in the position that he was putting forward. He also had the benefit of seeing the worker.

We accept the family doctor's evidence that the worker complained of hip pains from 1977 onward and that he had no problem before.

He is the only doctor to be in a position to tell us that because he treated Mr. U from childhood. He is the only doctor who would know whether there were complaints of hip pain prior to the accident. We do not attach any special relevance to his opinion as to whether the injury precipitated the hip problems because it is not our general feeling that a general practitioner would outweigh an orthopaedist.

It is true that we give less credence to the opinion of Dr. H because he saw the worker only once and he was asked specifically to see the worker for the back problem. We do not discount what he said, but we take it in the context of that.

We do not place a lot of weight on Dr. A's report because, again, he was asked only to comment and see the worker in reference to the back problem, which he did. And the only comment he made that could possibly be taken to reflect on the hip problem is the complaint of right leg pain, and we do not know what that sense really refers to. So in the scheme of things, his remarks do not seem to us to bear specifically on the hip problem.

We do not discount at all the opinion of Dr. D, the Board doctor. He gave reasons for his position; however, he did not see the worker.

And in weighing the relative merits of medical evidence, it has long been the Ombudsman practice to give, at least initially, more credibility to specialists who have seen the worker than those who have not and Dr. D is not, I believe,

an orthopaedist while the orthopaedists were.

That is how we weighed the medical evidence. And even though the case is difficult and even though you are asked to deal with the probabilities and likelihoods, we feel that the probabilities and likelihoods came down in favour of the worker being granted entitlement.

Madam Chairman: Thank you.

Any further questions from the committee at this time?
None at this time.

We now have the decision to be made whether we welcome some kind of summation or point of the position of the Workers' Compensation Board. As reviewed, there are no submissions in the file, but their position was known by the Ombudsman office.

In light of our decision yesterday on this very same point, I would like some comment from the committee as to whether we can welcome a presentation from the Board.

Mr. Charlton?

Mr. Charlton: As I said yesterday when we discussed this matter, I think under the circumstances we have no choice on this occasion but to hear from the Board, especially in a case like this one. And I would rather deal with that question again in the report of this committee out of these sittings than to deal with it by refusing, in this circumstance, to hear from them.

Madam Chairman: Mr. Philip?

Mr. Philip: I was tied up in the legislative committee when this decision was taken yesterday, and I just want on the record to note that I would have opposed the decision.

I think that the obligation is on both parties to present their evidence. And if the evidence is not presented, then one could only assume that there is no evidence, and I would have voted perhaps differently than some of colleagues yesterday.

I am not asking that the decision be reopened. The decision was taken and I am willing to stand by that, but I hope we will not be faced with this again.

Madam Chairman: Does the committee wish a vote taken on this matter?

Mr. Philip: I am willing to hear from them now. Since that position was taken yesterday, I think that we have to be consistent. I would have voted differently yesterday,

but since the committee has taken that position, I think we have to be consistent.

Madam Chairman: Any objections by committee members to that strategy?

None noticed.

Mr. Philip: Only for this set of hearings.

Madam Chairman: Noted, Mr. Philip.

Mr. Glasberg, any comments that you have to shed light on this would be appreciated.

Mr. Glasberg: Thank you, Madam Chairman.

I am not going to go through the dozens of medical opinions on this file. There are essentially four points which the Board feels need to be made about this decision.

The first is that a very lengthy period of time elapsed between the date of the back injury and the first record of the hip complaint.

Second, it is simplistic to determine matters of entitlement by merely adding up the medical opinions for one for against a particular theory of causation, rather it is necessary to analyse the opinions themselves to determine whether they are based on logic and sensible theories of causation.

Third, the medical reports which purport to link the back injury of 1976 with the hip problem of 1980, when examined closely, are speculative and should thus be accorded limited weight.

The final point is whatever caused the exacerbation of the Legg-Perthes syndrome it was not the accident of 1976.

Now I would like to go through these points in a bit more detail.

Madam Chairman, my understanding from the file had been that the initial complaint regarding the hip problem had occurred four years after the initial incident.

I had occasion yesterday evening to review the Appeal Board decision and it appears that the Appeal Board indicated and accepted that Mr. U was asymptomatic "until approximately one and a half years post-accident." I felt it was important to put that later on the record because it had not been raised before.

I do not know where that figure was obtained and it

would appear that the four-year period seems to be more appropriate, but I will leave that with you.

Mr. Philip: It is an important point and I am not sure you should leave this.

Is there not more evidence somewhere that would give us some information on that, either from the Ombudsman to contradict the four-year figure or for you to give us a little bit more information that would lead us to a conclusion that there was a four-year lapse?

Mr. Glasberg: I personally do not know where the one and a half year figure came from.

Mr. Philip: Can I ask the Ombudsman for that.

Ms. Keil: Where the year and a half came from?

Mr. Philip: Yes.

Ms. Keil: We have no idea how the Appeal Board came to that. That is not our position. Our position is that he complained after the accident.

Madam Chairman: Mr. Charlton?

Mr. Charlton: That is supplementary to that. Has that position from the family doctor been submitted in writing to the Board?

Ms. Keil: Yes, this was part of their own investigation.

Mr. Charlton: That indication is the Board file that there was a complaint from 1976 onward?

Ms. Keil: Absolutely.

Mr. Glasberg: I will get to that. I just want it to be very fair in terms of the facts that I was presented.

In the outcome, I do not really think that our argument hinges on whether it was one and a half years or four years; both those periods are extremely lengthy.

Mr. Philip: It was quite accurate. Is it another figure we have got now?

Mr. Glasberg: I am sorry, sir?

Mr. Philip: One is that the family doctor reported immediately after the accident on symptoms or had some record on it, the other is a year and a half, and the other is four years.

Mr. Glasberg: I will get to the position of the family doctor position shortly, because I do not believe that much credibility can be placed on that statement for reasons that I will suggest.

I think an important point which I think this committee really has to consider is that if there was a connection between this back injury of 1976 and a hip problem of 1986, one would have expected immediate onset of pain or a much closer temporal relationship between the incident and the reporting of symptoms.

Now, another thing that is really important for you to consider is that it would be clearly in the interest of Mr. U to be very forthright about all of the symptoms during the period between the accident and the onset of the hip problem. This is the case because disclosure of such symptoms might conceivably assist his compensation claim.

But significantly during this period, Mr. U must have visited at least a half dozen physicians. The fact that none of them recorded the existence of this complaint strongly implies that such complaints are not made.

Now, I guess Mr. Bell hit the issue on the head a little earlier when -- he may not have used these words, but it is really a question of corroboration of Mr. U's statements that he had complained about this injury.

Now, the Ombudsman's office have indicated that they are relying on the opinion of Dr. E or the statement of Dr. E, the family physician, to the effect that the worker indicated to him that he was suffering from hip problems. It is significant that although Dr. E saw the worker on numerous occasions, there is no record of the doctor ever having written down any notation regarding the hip problem.

What is also significant is that the first time that this came to the Board's attention was in, I believe, June 1983 when a Board investigator asked the physician if he recalled whether the worker had provided any hip complaints, and the physician indicated: Yes, he did.

But it is significant that this investigation took place in 1983. The worker saw the physician in 1976, seven years has elapsed, and we are counting on the recollection of a physician seven years down the road as to what an individual told him at a particular point in time.

I think the clear inference to draw, both in terms of this position and others, is that if complaints were made you would expect that they would be written down.

Now, the Ombudsman have also said that it accepts the

worker's statement that he felt pain over this period of time. My response to that is if those complaints were made, why weren't they noted in the medical reports of a physician.

The third point is that there was radiating pain into one of the worker's legs. I am not an expert on orthopedic matters, but it seems to me that the more common inference to draw would be that it was the individual's back condition that caused this pain to radiate.

There are a couple of other points I want to make which deal with this issue of corroboration because it is really important, particularly when we have lots of conflicting medical opinions.

Now, it is not only the notation of the complaint of pain that we should be looking for in these medical reports. If pain was recorded, you would have expected the physician to perhaps write a prescription for aspirin. You also would have expected to see some notation regarding limitation of hip movement because after all we are dealing with an arthritic condition.

Finally, I understand that the Legg-Perthes syndrome can cause inflammation and perhaps water build-up in the hip area. If a complaint such as that is received, it is typical for the physician to prescribe anti-inflammatory drugs and no where in any of these medical reports were any of these points mentioned.

I think there is a clear inference to be drawn from that that there was no complaint regarding the hip made in this period of time.

Madam Chairman: May I interrupt you for just one movement.

Mr. Charlton, do you have a question?

Mr. Charlton: Yes. Just on the question of lack of reference to the hip problem prior to 1980 and your assertion out of that that that is a clear indication that there was no problem, you said you want to be fair in terms of how this committee views the medical evidence.

Is it not the case that that is a rather regular occurrence in terms of medical reports which are submitted on compensable accidents to the Board, that secondary problems, problems that are viewed initially as minor problems and minor complaints associated with an accident, a major accident, are omitted from Board documents and they become a contentious issue on a regular basis at the Board?

Mr. Glasberg: If I were an injured worker or injured

worker's rep, I would want to make sure that any possible connection between the work place injury and my --

Mr. Charlton: Is it not a fact that that is a regular occurrence in terms of medical documentation that is submitted to the Board?

Mr. Glasberg: I would not say it is regular. I could understand if there had been an omission in one report, but we are dealing with at least a half dozen reports by different physicians, and the question is: Why didn't the physician note this complaint if in fact it was made?

Mr. Charlton: You are essentially saying it is not a regular issue of contention in Board's hearings?

Mr. Glasberg: Sure, there are disputes regarding the facts that are put forward.

Mr. Charlton: I asked you: Is that a regular occurrence in terms of things that occur in association with accidents the Board is confronted with?

Mr. Glasberg: I would think it unusual for a worker who is represented by legal counsel or an experienced representative not to put down all possible symptoms.

Mr. Charlton: The worker when he gets to a hearing is represented by legal counsel or somebody else and that is when the issues get raised. So the legal counsel and representative are in fact putting that on the record.

I asked you a question in relation to medical reports where there is a major injury and one or more minor complaints associated with that injury and the minor complaint gets overlooked in the report that goes to the Board; is that not a regular occurrence which causes contention in subsequent Board hearings?

Mr. Glasberg: I would say it might happen. But I think the question to ask is: Is it not significant that a half dozen medical practitioners or whatever the number is, some who are specialists in the field, failed to address a complaint that was allegedly made by the injured worker.

Madam Chairman: Further questions at this point?

Mr. Glasberg: The second point I would like to deal with is the issue of this kind of mechanistic approach of adding up medical opinions and if you have got six on one side and five on the other, bingo, you have got causation.

I think what this case suggests to me is that you ought not to look at six versus five or seven versus six. The message is perfectly clear, diversion of medical opinions.

The doctors simply do not know what the right response is. There is no clear predominance of medical opinion. People are speculating and pulling all sorts of theories out of the air. When that happens, when we do not have a clear medical answer, it is necessary for us to look at the other factors surrounding the case.

As I have said, medical evidence is one of a variety of factors in which an adjudicator must take into account.

The other factors here, the onset of complaints, do not appear to have occurred until many years after the initial injury and that this individual had a pre-existing condition which, the evidence suggests, would have manifested itself sooner or later.

Now, the third point deals with the theories that have been developed.

Mr. Bell: Can I stop you on the second point.

Mr. Glasberg: I am sorry.

Mr. Bell: I think the other evidence, the non-medical evidence, that you just suggested is certainly capable from the body of the evidence that we have heard. But you would also agree there are some other conclusions that are capable; I do not know whether equally, but available from the evidence, like the falling down, rolling down the hill and having the heavy bucket strike him in the back and the hip area, might be abnormal, the limping or the gait, like the decision itself which is probably a double-edged sword? That is all I can think of right now.

I am not asking you to agree that they are equal but there are other available conclusions?

Mr. Glasberg: I think there are other possibilities. I would agree with you. I would not call them probabilities, but I think they are more in the realm of speculation and conjecture.

Mr. Bell: More speculation and conjecture than yours?

Mr. Glasberg: Well, we know that this individual unfortunately would have -- or this individual's disease would have manifested itself. We know that as a certainty. We can't tell exactly when, but we know that there is a reasonable probability that somewhere down the line the disease manifests itself.

We also see that there might be up to a four year gap between the compensable injury and this condition. If they are linked, why weren't they linked earlier? That is the

question.

Again, I keep repeating this common sense approach to adjudication, and the fact that we have this significant time delay is something that cannot be ignored.

Now, Dr. Hill in his introductory speech strongly urged the committee to carefully look at the medical evidence that was put before you, and I couldn't agree more with Dr. Hill's statement. Let's look at some of the medical theories that have been advanced to try to connect the 1976 accident to the 1986 hip problem.

We have the family physician who suggests that the hip problem caused by limping which was due to the original accident. It is a theory, but there doesn't seem to be any body of interpretation to back it up. I know the Ombudsman's office have complained about medical opinions that appear to be terse or abrupt, not fully reasoned, and I think that opinion falls into the category.

We next have the opinion of Dr. B who is an orthopaedic surgeon. I would like you to pay careful attention to the words "perhaps the worker's back problem and his initial radiation of pain into the right leg region made him walk in an abnormal gait and perhaps this aggravated his right hip condition."

Again, it is hypothetical, but Mr. U may have experienced pain in the right hip that was initially overshadowed by the intense pain in his back.

We then have Dr. C who indicates to us that the fall twisted the hip, and I do not know that this opinion can be given a tremendous amount of weight because it appears to be based on the worker's indication that he complained about the incident very shortly thereafter.

Finally, we have Dr. G who says the accident could possibly have precipitated symptomatology, but the physician then indicates that it is a difficult decision because Mr. U would have developed the Legg-Perthes syndrome eventually.

So, we have got three speculative theories on the table to suggest why there was a workplace connection. There is not even consensus among the physicians who would suggest that this is a work related injury. I think that is a significant point for the committee to consider.

The final point I want to deal with is the issue of causation. I know I may be repeating myself but it is important. The Board's position is that whatever caused the exacerbation of the Legg-Perthes syndrome, it was not the accident of 1976.

Now, the key test which must be applied to these sorts of cases is found in Section 31 of the Act which states:
"Did the accident arise out of and in the course of employment?"

Out of employment means because of employment, as a result of employment, through employment. There must be a causal connection on a balance of probabilities. If such causation cannot be shown, the Act does not permit compensation to be paid. Equally important, speculative theories and conjecture are not sufficient to satisfy this test.

To repeat, the question that must be asked is whether on a balance of probabilities Mr. U's back injury of 1976 caused the occurrence of the hip problem in 1986 or whether it was the pre-existing disability which would have appeared irrespective of the accident.

In the Board's view, there is insufficient evidence to indicate or to conclude that the 1986 hip condition was work related.

I have a few other very minor points, but perhaps you --

Madam Chairman: Maybe we could have questions at this point.

Mr. Charlton?

Mr. Charlton: If the family doctor's not well documented contention that the complaint about the hip problem existed from the time of the accident onward had been well documented, would the Board's view of this case be different?

Mr. Glasberg: I think what would have to be documented is there was a serious medical condition in the hip which continued to be reported on a regular basis for an extended period of time, perhaps a couple of years, to establish some sort of continuity.

Mr. Charlton: That is what I am saying to you. If what the family doctor is saying in fact occurred, if it had been well documented that it occurred, would the Board's view of this case be different?

Mr. Glasberg: If it had been documented, as I indicated, by the practitioner over a lengthy period of time and there had been some corroboration by perhaps some other professionals, it might be sufficient.

But I mean, we are not anywhere near that. We have got six physicians -- I am guessing, there may be more, there may be less -- who have not recorded in their reports any

complaint about a hip problem and there is a clear inference for us to draw from the lack of that information. You are not going to have a half dozen physicians being sloppy in terms of putting down complaints that are put forward.

Mr. Charlton: Remembering that, at least in the case of the first two orthopaedists, the claimant in this case was referred to them with regard the back injury and not referred to them with regard to a hip injury.

Mr. Glasberg: The orthopaedist people are specialists. And once again, I gather the first thing that the physician would do is ask the worker for medical history; what is bothering you, then do a fairly full examination.

Does it hurt when you do this? Does it hurt when you do that? You would have expected the worker to come forward with the complaint for the doctor to have recorded the complaint and then to have done something --

Mr. Charlton: That is what I am asking. Is the question of continuity the major objection that the Board has in this case?

Mr. Glasberg: Continuity is very important. The other item which is key is the four-year gap.

Mr. Charlton: That is the continuity.

Mr. Glasberg: That is another way of looking at it. The third point is that I guess there was no immediate onset of problems in the hip from the --

Mr. Charlton: That is the continuity again. We have three, not one. Is that the issue that has caused the Board to hold the line in terms of the decision on this case?

Mr. Glasberg: The final point on this case is the balance of probabilities. The Appeal Board took the position that it was more likely than not that the manifestation of this condition was caused by the pre-existing problems and not work related.

Mr. Charlton: Because of the question of continuity?

Mr. Glasberg: Continuity, I think, is weighing the medical evidence as well. There is a bunch of speculative theories on the table respecting work relatedness while there is some certainty that this individual would have contracted this condition down the road, except we do not know --

Mr. Charlton: All what you just said was linked to the question of continuity, the four-year gap.

Mr. Glasberg: I think it is a question of causation and continuity and the presence of other viable theories of causation. I mean, if cases like this, where you do not have a medical opinion that is directly on point, you have got to look at a variety of factors in order to figure out if this is caution.

Madam Chairman: Yes, Mr. Lupusella?

Mr. Lupusella: On the issue of continuity, I am a little bit concerned because I understand very well your point and I think it is part of the Board's practice to take into consideration the issue of the continuity before establishing entitlement for benefits.

But the other factor which the Board takes into consideration is that sometime when there is continuity, there is a lack of medical findings or physical findings which might justify the continuity of the complaint. Where do you draw the line? One way or the other the worker is going to lose anyway.

Mr. Glasberg: I cannot agree with that. I mean, in this particular case, if there would have been a hip problem, the orthopaedist would have taken a hip x-ray presumably which would have indicated the presence of the Legg-Perthes syndrome which would have been reported to the worker. None of that happened. I do not know if I am responding to your question.

Mr. Lupusella: Not necessarily, because in this particular case you had one medical finding which did not pertain to the accident which was the pain -- the Legg-Perthes disease, which is not a work related disease; am I correct?

So if there is a continuity on the issue of the appellant to complain about the problem, the Board would have taken the route of pinpointing this particular problem which was not work related. I am making reference to the pain in the leg to the Legg-Perthes disease.

Mr. Glasberg: Just so that I fully understand what you are suggesting, is that even if the Board found that there was continuity it would turn this claim down?

Mr. Lupusella: Down because of this not related accident item which is the Legg-Perthes disease.

Mr. Glasberg: I guess the difficulty the Board has in this is this: If it would have received a complaint about a hip injury two or three months down the road, there is this sense of: Well, you know, maybe there was some connection here and maybe you are not so concerned about continuity.

But when the gap is four years, you are driven -- and there is another theory of causation out there -- you are driven to say: What went out in the four-year period? I mean, why was there not a complaint? It is a legitimate question.

I mean, you have to ask them because there is a worker involved in this case and an employer as well and there are competing interests and you have to make the decision according to the law.

Madam Chairman: Mr. Philip?

Mr. Philip: You make a point that of the various physicians that had seen him and the absence of notation in their files concerning this, and I am wondering if you can tell me what is the number you are putting on when you calculate the number of physicians whom you think should have noted in their files this matter?

Mr. Glasberg: I made a rough calculation of the number of physicians which Mr. U had seen between 1976 and 1980. I think I may have underestimated the number.

There was Dr. E in 1976, Dr. A in 1977, there was the visit to DRC in '77, there was Dr. H in '78, there was Dr. B in '78, and so I guess that is a half dozen.

Mr. Philip: You are saying there were six that physically examined him?

Mr. Glasberg: Yes.

Mr. Philip: How many of those would have examined him on more than one occasion?

Mr. Glasberg: I presume it would be the family physician, and there is some evidence that another orthopaedist surgeon had seen this individual on more than one occasion. That would be Dr. B.

From my notes I see that there was a visit involving Dr. B in 1978 and I am uncertain whether there would have been further visits before 1980. I am told that there were further visits to this orthopaedic surgeon before the operation.

Mr. Philip: So only two saw him more than once?

Mr. Glasberg: Also Dr. A, I am sorry, who is the orthopaedic surgeon who saw him first in North Bay in February 1977. That is my understanding.

Mr. Philip: How many times would Dr. A have seen him, five or six times?

Mr. Glasberg: Three times.

Mr. Philip: The five is now reduced to three that would have seen him more than once physically.

Mr. Glasberg: Doesn't that cut the other way? If a physician had five opportunities to see an individual and five opportunities to draft a report, does that not tend to suggest even more that the complaints were not made?

Mr. Philip: It may depend on where the particular pain was that was bothering the patient on that particular date or what specifically he may have been referred for.

Of the three then, you have one that has some consistent noting of the problem; namely, Dr. E, the family physician?

Mr. Glasberg: I would guess that the other two orthopaedic surgeons took notes as well each time they saw the individual. That would be my understanding of the way these referrals work.

Mr. Philip: Is it not true that the reference to those two physicians, two orthopaedic surgeons, was to deal with the back problem?

Mr. Glasberg: As the Ombudsman said, the backbone is connected to the hipbone. You would have thought if there was a complaint in the back and you are going to an orthopaedic surgeon, if there was a complaint in close proximity, you might also raise that.

Mr. Philip: Or a patient not being sophisticated might only answer the question that the doctor asked him and if the orthopaedic surgeon only had a reference on a particular problem and unless he asked the right questions, he might not get the reference, is what I am saying, to the other problem.

Mr. Glasberg: It is a problem. But you would not expect that to happen in each and every case. In my mind, it just doesn't seem probable to me.

Mr. Philip: Each and every case is only two cases; namely, two doctors with a specific reference to the back?

Mr. Glasberg: There are lots of doctors, some of whom saw this individual on more than one occasion, and there is nothing in any of the records. You may draw a particular inference from that, but with great respect, I would draw a different inference.

Madam Chairman: Any further questions?

Mr. Bossy?

Mr. Bossy: Just a comment here and I am still looking at Dr. H's documents. It seems strange that this is going back to '78.

You did say, and I sort of have to agree that there is no record of him directly pinpointing that hip, and he also here indicates in the bottom: "Actually, I have not had the opportunity of reviewing his x-rays, but a report of July '77 would suggest that they are normal."

So these x-rays they are talking about, what x-rays would they have been?

Mr. Glasberg: I believe those x-rays were taken from the Downsvew Rehabilitation Centre. The injured worker went to the centre to receive an assessment and presumably some treatment relating to the back injury which he suffered in 1976, which was compensable. I understand that when you take a back x-ray, depending on the x-ray, your hip comes into it as well.

Mr. Bossy: In other words, there were x-rays that should have revealed it. Whereby he goes on to say there was a femoral head problem on the right side. Is that saying that that would relate to the leg?

Mr. Glasberg: I believe that the reference to the femoral head is a part of a hip joint, and what the doctor is saying is that he does seem to have this problem but that there are no complaints. So it is asymptomatic, really.

Mr. Bossy: As far as the family doctor -- and I was concerned about him because the family doctor actually brought him into this world in 1967 -- and the only reference that I see here is where the family doctor -- and it is only after an Appeal Board hearing in '83 that he then makes the comment that he knew all along that the man had a hip problem.

But any medical reports based on this incident, had they ever been tabled or brought forward during any investigations prior to '83 by the family doctor?

Do you have any record that the family doctor supplied evidence prior to '83 as far as indicating that hip problem?

Mr. Glasberg: I am advised that the answer to that question is no.

Mr. Bossy: All right. It is very difficult, and I believe you have said it is very difficult, but when you try and follow all of these doctors and there seems to be an awful lot of after-the-fact statements at some distance

after the accident occurred here.

Mr. Glasberg: I think we sometimes ask too much of doctors.

Mr. Bossy: There are so many conflicting statements by all these doctors and that is my point brought up several times.

Do they not get their act together or do they not go to the same medical schools? It is difficult, I understand, but it is a very, very difficult situation for us to draw. In other words, what evidence is there that that hip -- and if there is nothing, fine, and forgive me. It is only based on his own.

The thing that concerns me the most is the family doctor, that should be the closest to that person, and that he never identified that or brought it forward in evidence and to me that carries the most weight.

Madam Chairman: Mr. Elliot?

Mr. Elliot: To change the topic here just a bit and get some information clear in my own mind. I am quoting from the information we were given, and there is some doubt in my mind as to whether or not the hip injury was directly related to the back problem, and it is with respect to the prior reading and some of the prior information given to us earlier today and the diversion of that information. In the second paragraph on page 8:

"On October 26, 1976, Mr. U was an employee of the C.P.R., when he was going up a small slope carrying some railway bolts and slipped."

The vision I had conjectured in my own mind as the Ombudsman spoke about this, I saw this person going backwards down a slope and flipping around and landing up against the pail of bolts or against a fence or some other object and it was a severe kind of bruising that occurred at the lower part of his spine.

I am just wondering, from your point of view, if there was any attempt to reconcile what appears to me in the interview summary sheet here as something that is relatively minor with a fairly dramatic kind of somersaulting effect in the other instance?

Mr. Glasberg: I guess the issue really did not arise in 1976 because whether it was a real major injury or something less significant, it was work related, and the individual suffered a back injury for which he was entitled to compensation.

Perhaps the issue of how severe the fall was has some relevance now to the question of, you know, if there was any hip involvement. But I think to go back years after the fact and to try to straighten this out, you really have some faulty memories. I think that, you know, the Board regards the fall as being insignificant.

I mean, the chap did hurt his back and he received compensation for an extended period of time. But I agree there is some discrepancy here in terms of --

Mr. Elliot: My supplementary to that is we all agree that the severity of the back problem must have been quite large.

Now, in the medical reports, is there any indication that it was just simply a back injury, because the other type of hip problem that was there could have slowly permeated into the hip or in a kind of situation as explained this morning, if he is slipping down the slope and his legs are flipping too, the accident itself could have started that at the accident time, you see.

So I am just wondering, does the medical evidence show that if you have the back problem it can start the hip problem if U just slipped and hurt his back seriously?

Mr. Glasberg: I am not sure if I am competent to answer that question. If you are not satisfied, we have a physician in the audience.

I would have thought that if there had been a major trauma to Mr. U's hip, you would have expected real pain very quickly in the process. You would have expected synovitis which is fluid in the hip and swelling, inflammation because it is an arthritic condition.

The next question is whether there is any way that the injury might have put into place a gradual process which four years down the road suddenly manifested itself into the Legg-Perthes syndrome full blown, and we discussed that possibility.

I do not believe that there is medical evidence to support the proposition. It seems that Legg-Perthes syndrome, when it does come on, comes on very quickly with a sharp onset of pain which seems to be consistent with what occurred here.

Maybe you would want to talk to Dr. McFarlane about that.

Mr. Elliot: I am wondering if Ms. Keil would like to react to it.

Ms. Keil: I am not disputing whether or not that statement is true because I do not know. But the Board until today has never raised to us the notion that Legg-Perthes' pain must come on immediately.

Mr. Glasberg: I am not raising it here as a submission. We have a question which was posed asking for some theories and I felt I needed to respond to that question as best I could. It was not my intention to put forward another theory at this late stage.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Considering that we are lacking medical records about the physical complaint of the injured worker since the injury occurred affecting the hip, are you aware as to the worker, while he was receiving full compensation for a certain period of months or years, if he ever raised the issue of a hip on the weekly report which he was filling out on a weekly basis?

Mr. Glasberg: I am told there is no mention of any hip pain in any of the reports which were submitted to the Board by the injured worker.

Mr. Lupusella: How long has he been receiving compensation, since 1976, October 26?

Mr. Queen: To July 11, '77.

Madam Chairman: Mr. Charlton?

Mr. Charlton: My question relates to that contention. In the Ombudsman's interview summary, in the third paragraph:

"According to reports by Mr. A, an orthopaedic surgeon, his rate of recovery was slow, although Dr. A noted back and hip injuries."

Is that in fact confirmed in doctor's report or is that just a contention of the complainant?

Ms. Keil: The interview summary records is only what the investigator took from what the claimant said and it has no more weight than that.

Mr. Charlton: It is not confirmed in any medical reports.

Madam Chairman: Any further questions at this point?

Mr. Bell?

Mr. Bell: Mr. Glasberg, can we talk about the medical

referee for a moment?

Mr. Glasberg: Yes.

Mr. Bell: We do not have his report, but he is referred to at page 4 of the synopsis, paragraph 7. It is a fair representation of Dr. G's advice to the Appeal Board that the worker should be entitled to retraining benefits?

Mr. Glasberg: Do you want me to read the relevant sentence in the physician's report?

Mr. Bell: Sure.

Mr. Glasberg: Maybe I will put in the whole paragraph, it is not too long.

"The problem here is that he has asymptomatic Legg-Perthes Disease prior to the accident. It is possible that the accident precipitated symptomatology in a previously asymptomatic joint. At the same time, he probably would have developed symptomatology eventually anyway. It is therefore a difficult situation. It is my feeling that he should not be given a permanent disability pension because of his hip. I think, however, that a fair compromise might be for him to be retrained for the type of work his hip will allow him to do and for him to be on compensation during that retraining period. In the meantime, we are going to try to get x-rays of his hip prior to the first fusion for me to review."

I would say that the Ombudsman's summary adequately reflects the gist of the opinion. I would add, though, that Dr. G has a misapprehension about the question of entitlement under the Worker's Compensation system. Unless it can be shown that an injury is work related, the individual is not entitled to any benefits. So the point about not providing the individual with a pension but retraining him, is not something that could be done under our Act.

Mr. Charlton: That is not correct. If the doctor hasn't specifically said it, but if he in fact viewed the hip problem as a pre-existing condition -- which we have all agreed that it was the disease, the disease was there, the abnormality was there -- and he viewed the accident and the hip problems in relation to the accident as an aggravation of the pre-existing condition, in fact that would entitle him to benefits from the Board without entitling him to a permanent disability award for the pre-existing condition?

Mr. Glasberg: Except that Dr. G's opinion about how the hip injury was related to the back injury is like so many of the other opinions we have seen here, fairly speculative.

I mean, there is a point here, though, the injured worker does have entitlement for a back injury and he was declared fit to return to work. Presumably during that initial period of time, he would have been entitled to both vocational and rehabilitation services.

If this committee should come to the determination that the hip injury is not work related, I guess there would be nothing to stop you from saying that nonetheless we feel the Board should have a look at this individual to determine whether vocational and rehabilitational services would be applied to this case.

Mr. Lupusella: He was not receiving a pension?

Mr. Glasberg: He was not receiving a pension. I mean, he was deemed fit to return to work in 1977. But an injured worker is always free to come back to the Board and to the vocational and rehabilitation area to receive assistance.

Mr. Lupusella: My understanding is that unless the injured worker is not receiving a pension, he is not entitled to the assistance.

Mr. Glasberg: He would not be entitled to a supplement, but the Board would have the ability to assist him with training, for example.

Mr. Charlton: I do not think it is fair to say that there is no record on the Board's part of providing retraining where the complainant or the injured worker cannot demonstrate a permanent loss of earning capacity as a result of the compensable injury. I think Mr. Lupusella is right in that respect.

Mr. Glasberg: It may have been a red herring and perhaps I should't have raised it.

Madam Chairman: Mr. Bell?

Mr. Bell: Dr. G was one of three possible choices put forward by the Appeal Board; is that correct?

Mr. Glasberg: That is my understanding.

Mr. Bell: Presumably Dr. G has had some prior experience with examination of injured workers and has given opinions to the Appeal Board panel or the Board itself?

Mr. Glasberg: Yes. I would say yes. He is a well respected orthopaedic surgeon.

Mr. Bell: In relative terms, has he had extensive experience in Board-related matters or some or little?

Mr. Glasberg: I am told that he has some experience, but not a lot. He would not be used frequently by the organization.

Mr. Bell: Is he still used?

Mr. Nemet: We do not use medical referees any longer.

Madam Chairman: Pardon me?

Mr. Glasberg: I am told that the Board no longer uses medical referees. It might not be surprising after this case.

Mr. Bell: Except that, and am I correct, the committee has had, I think, a fair bit of experience with medical referees being involved in the Ombudsman process. I think this is the first time that the opinion of a medical referee has not been accepted by an Appeal Board Panel.

I guess the question is: Even though you do not use them anywhere, when you did, how many times did you reject an opinion and recommendation of a referee?

Mr. Glasberg: I would argue with the point you are making about the Board rejecting his opinion. This physician has indicated it is possible that the accident precipitated symptomatology in a previously asymptomatic joint. At the same time, he probably would have developed symptomatology eventually anyway. So I consider that to be an odd answer, with the greatest respect.

The recommendation that he did make was with respect to the disposition of compensation in this case, which was a question probably he was not asked, and he has put forward an answer that appears to be contradictory to law. So he probably answered a question that was not referred to him.

Mr. Bell: Is there a letter of retainer between the Board and the referee?

Mr. Glasberg: There would be one in the file, yes.

Mr. Bell: Do you have it today?

Mr. Glasberg: Just to recap, I gather that the Appeal Board gave the injured worker's representative the choice of three specialists to act as the medical referee at the relevant point in time and that the injured worker chose this position.

We are endeavouring to determine whether we can find the letter. May I read it into the record?

Mr. Bell: Please.

Mr. Glasberg: This is a letter sent to Dr. G dated October 4th, 1985, signed by Dr. D at the Board.

"I am attaching complete reproductions of the medical reporting received throughout the file and also of the administrative handling by the Board of the situation. I shall endeavour to arrange that at least some of the x-rays are made available to your office. The Appeal Board had asked that you review the documentation, interview and examine Mr. U and offer your opinion as to whether or not it is a reasonable matter to accept this right hip joint problem under this claim. It is realized that this consultation will take in excess of standard consultation and I shall be grateful if you would submit your account to me personally to go with your consultation report."

Madam Chairman: Mr. Charlton?

Mr. Charlton: Just on this question on the medical referee, whether you are no longer using them or not, it seems to me that the purpose of a medical referee, in a case like this, is where you have got a lay Board hearing an appeal and you have got conflicting medical opinions, the two sides then agree -- as trade unions do over arbitrators, and so on -- on a medical person who is deemed appropriate to adjudicate the conflicting medical opinions.

Is that a fair understanding of the process of a medical referee?

Mr. Glasberg: The only question that can be asked of a medical referee is: What is the probability that a particular event precipitated a particular injury? And with that answer in mind, the adjudicator then goes away and renders the decision. The difficulty with this is: I do not know that there has been a satisfactory answer to the question posed.

I mean, in reading what Dr. G says, I am not certain what his view is on the organization.

Mr. Charlton: He may have erred in the context of what was possible, but I think his opinion is clear to the extent that even if he still has questions in his own mind, he would give the benefit of the doubt to the worker.

Mr. Glasberg: I do not see him saying that in the report, nor do I think that the benefit of the doubt is a concept which would be used by physicians. It is an adjudicative rule that is employed when the evidence for and against a situation is evenly balanced.

Mr. Charlton: Would it be fair to say, though, that in light of his use of the word "possible", which he uses in that paragraph you read -- is that correct?

Mr. Glasberg: Yes.

Mr. Charlton: That he concluded by finding that the claimant in this case should receive benefits?

Mr. Glasberg: He says it is possible that the accident precipitated symptomatology in a previously asymptomatic joint, then he says at the same time he probably would have symptomatology --

Mr. Charlton: I understand that.

Mr. Glasberg: It probably goes to the latter rather than the former.

Mr. Charlton: What he, in fact, is saying in that case is, is it not so that this worker has a problem now that he would have had eventually and therefore the Board should have some responsibility? Is that not an appropriate interpretation of what the medical referee is suggesting?

Mr. Glasberg: I think he feels that something should be done for this injured worker. Unfortunately, if that is the best that they can put forward, it is not available under the legislation.

Mr. Charlton: That was not my question. My question was: Whether or not his opinion is suggesting that this worker is having problems with this condition at this time -- even if he eventually would have had it anyway -- problems with this condition at this time are the result of a compensable accident and, therefore, the Board should take some responsibility in this case in spite of the fact that what is suggested the Board's responsibility should be may be in error?

Mr. Glasberg: I think the worker should be helped. But the difficulty is it is not a work related accident in the Board's view and unfortunately --

Mr. Charlton: You have asked him to adjudicate this and he obviously has found a connection.

Mr. Glasberg: What he has said is that it is possible that the accident precipitated symptomatology, and the word possible -- possible to me does not mean 50 per cent.

Mr. Charlton: I repeat, I understand he used that word. I am suggesting to you that his conclusion firms up his opinion that the Board, in fact, has a responsibility in relation to the hip.

Mr. Glasberg: I do not see that he has made a medical conclusion. And I do not think, therefore, any conclusion made about whether this individual should be helped does not flow from the medical reports. It was a question that he was asked to respond to.

Mr. Charlton: I guess my question, to focus it a little better, is: What right does the Board have having agreed to have a mutually agreed medical person, to adjudicate the medical diversion of opinion, having agreed to do that, what right do you then have to reject the adjudication?

Mr. Glasberg: I guess the letter to Dr. G might have been a bit unclear. I think often physician's do not know the questions that they are legitimately entitled to respond to as far as the Board is concerned.

Dr. G was asked to provide his best medical advice as to whether the 1976 accident could in some way have precipitated the 1980 condition. That is what his expertise is. He is not an expert in adjudicating claims for the Workers' Compensation Board.

Mr. Charlton: I understand that and I am not disputing that. His conclusion though, clearly reflects where his weight of opinion falls, on the side of the worker.

Mr. Glasberg: I don't --

Mr. Charlton: What right do you have to reject that adjudicator's opinion?

Mr. Glasberg: First of all, the physician has no right to make an adjudicated position. It is his role to provide medical evidence. It is then the role of the Board to take that evidence along with other material and render a decision.

If Dr. G had said: I have looked at the 11 medical opinions on file and my view is that, well, really there is firm evidence in my view that there was a connection between the accident and the result, that is a medical opinion and the Board would have acted on it.

He doesn't say that. He is unsure himself, which goes to the issue of the rights of medical evidence and the fact that this now leaves the Board with the role of having to look at all the factors of the case and making a common sense decision on the result.

Madam Chairman: Mr. Glasberg, do you have any idea on the percentage of occurrence of this Legg-Perthes in males or females?

Mr. Glasberg: I do not personally, but perhaps that is the general sort of question which Dr. McFarlane might be in a position to respond to. Would that be acceptable?

Madam Chairman: Ms. Keil, do you know the answer to that question?

Ms. Keil: How common it is to have that?

Madam Chairman: Yes.

Ms. Keil: No, I do not know.

Madam Chairman: Could Dr. McFarlane perhaps answer that question for us, please?

Keep in mind that the hour is late.

Dr. McFarlane: The answer to that is it is uncommon.

Madam Chairman: So it would be a very small percentage, one, two, five?

Dr. McFarlane: About three per cent.

Madam Chairman: Does it go more to males or females?

Dr. McFarlane: Probably more in males. But it starts off -- it can start as early as two years in age and probably the more frequent ones between six and ten.

Madam Chairman: Is it an hereditary disease?

Dr. McFarlane: Not hereditary, no. We do not know why it happens like this. It is a vascular problem, and if the growing part of the head and the femur do not have the proper blood supply -- and while this situation is happening you have to protect the growing head, and unless you do, it becomes deformed and that then stops once the child has stopped growing.

Madam Chairman: When would this normally manifest itself, if at all? Does it always manifest itself with some kind of symptoms?

Dr. McFarlane: You mean as child?

Madam Chairman: At any age.

Dr. McFarlane: Yes, you usually complain with the hip pain.

Madam Chairman: At an early age?

Dr. McFarlane: If they have it at two, obviously they

do not complain. But a six year old --

Madam Chairman: If they did not complain at the age of six, would they then complain at the age of 10 or 20 or 30?

Is there another onset period of time that the symptoms could manifest itself or would it be dormant in the system's stage?

Dr. McFarlane: Say the child has it at six and has no treatment, symptoms would subside by fourteen in a boy. He may not have any trouble then during his teens. He may not be aware of any limitation of hip movement.

There are some cases where, for no apparent reason, people will start suddenly having pain in their hip in their early 20s, and if you take an x-ray at that time there is no evidence of arthritis. And the reason for the pain is this is the earliest form of arthritis. This is unusual, but it does happen.

It is more likely -- and this depends on the age when the child has the disease in the first place. The earlier they have it, the less problems they seem to have. The later they have it and if it is not treated, the earlier they will have symptoms in the hip. It is more likely to happen in the 20s as opposed to their 30s, 40s or 50s.

Madam Chairman: Do dramatic events bring on the onset of this type of disease, the symptoms of this disease?

Dr. McFarlane: At which stage, after it is burnt out? Once the child has stopped growing, that is the end of it as a disease process. It is not a disease.

Madam Chairman: After the disease process, if someone has Legg-Perthes, would dramatic events bring on the onset of symptoms of this -- I do not know what to call it, disease, or bring on the symptoms. So if someone had it...?

Dr. McFarlane: If we know that somebody has had it and it has been treated and at the age of, say, in their 20s, they do have an injury to that hip, it will be more susceptible than the normal hip on the other side.

In other words, he will start to complain of pain in that hip if he has an injury to the hip. But it depends, of course, on how severe the injury is. Now, a minor twisting and so on may give him symptoms over a small period of time, a week, and then it usually settles down.

Mr. Bell: The trauma that may bring on the symptoms during the period that we are now discussing does not --

Dr. McFarlane: In the adult.

Mr. Bell: In the adult. It does not have to be directly to the hip; does it?

Dr. McFarlane: Oh yes, in the hip joint.

Mr. Bell: There can be a trauma suffered by the body which has some effect on the hip joint that could render those --

Dr. McFarlane: No, it has to be the hip joint. It is the ball and socket part of the joint as opposed to -- you are saying, well, if he has an injury to the other hip, it does not necessarily affect that one.

Mr. Bell: Let's put it this way. A fall off a ladder could bring on the symptoms?

Dr. McFarlane: Oh yes, if the hip is injured.

Mr. Bell: I wish I could repeat the question that has just been referred to me. A fall on a man's rear end from a ladder could bring on the symptoms?

Dr. McFarlane: It would, yes.

Mr. Bell: Squarely on the rear end?

Dr. McFarlane: It can, yes. In fact, he probably strained his hip.

Mr. Bell: All right. My point was that -- let's call the trauma a blow -- the blow to the body would not necessarily have to be one directly to the hip, but would be a blow that would have some impact on the hip?

Dr. McFarlane: One of the problems that I have with what everybody is talking about here is what the patient is talking about.

I have patients that come in and say: I have got pain in my hip. And I say: Now, where is your hip. And they point around here, they point to their back. And I say: That is not where your hip is.

Well, I do not have pain there. This is where I have it. Now, you see, they talk about pain in their hip and in fact they are talking about a pain from their back.

Okay, that is one point.

Mr. Bell: I do not want you to relate any of this to the evidence before us otherwise the Ombudsman's office is going to --

Dr. McFarlane: All right. The other problem I have is when somebody talks about -- I have pain in my leg, and I say: All right, this is for my benefit, this is your buttocks, this is your hip, this is your thigh, this is your leg. They say: No, it is not in my leg, it is in my thigh.

They are talking about a sharp pain down in the leg, when in fact they are talking about a sharp pain down in the thigh, which makes a big difference because root pain does not go below the knee, it only goes to the thighs.

Hip pain is fascinating. A patient complains of pain in the knee, but in actual fact it is coming from the hip. It doesn't go down the thigh, the same as the pain in the back or a root pain which goes all the way down the leg.

Mr. Bell: I am not going to ask you where knee pain refers to.

Madam Chairman: I just have one further question.

With respect to the medical report we have from Dr. H, it is not with respect to anything he has in it, but there is a statement there that says he does have a femoral head problem on the right side, and Mr. Glasberg referred to that and he said that Dr. H meant there about the Legg-Perthes.

Dr. McFarlane: That is correct.

Madam Chairman: Would you say that is what he was referring to?

Dr. McFarlane: That is exactly what he was referring to.

Madam Chairman: A femoral head problem on the right side, that would be an appropriate way of describing it?

Dr. McFarlane: Yes. We talk about the femoral head for the bone that was deformed when he was a child.

Madam Chairman: Okay. Thank you.

I think Mr. Lupusella --

Mr. Lupusella: I have a final question because the specialist is here. Why was surgery appropriate in this case?

Dr. McFarlane: Because he was having pain in his hip and I return to the fact that it was going to go on further.

Madam Chairman: Is that a point of order?

Yes, Ms. Keil?

Mr. Lupusella: It is part of the evidence that surgery took place.

Ms. Keil: I agree, but it is an opinion given in this case by a doctor that is merely speculating.

Mr. Lupusella: Well, the evidence we had before us is that the surgery happened...

Madam Chairman: It is not new evidence, but the medical doctor is making reference to why surgery has been made and he is giving a medical opinion on this particular case in this instance.

Ms. Keil: I just want that noted. I have no objection to that information.

Madam Chairman: Mr. Lupusella, do you still want to get an answer to your question?

Any further questions of Dr. McFarlane?

(No response)

Thank you very much.

Any questions of Mr. Glasberg before he has an opportunity to sum up?

(No response)

Mr. Glasberg: I have just have one minor point to make before summing up. Actually, a couple of minor points.

The first is: I believe that Dr. F was referred to as an orthopaedic surgeon. My understanding is that he does not have these qualifications.

Mr. Charlton: What doctor was that?

Mr. Glasberg: Dr. F.

Madam Chairman: I have noted that he was referred to as an orthopaedic specialist and perhaps, Ms. Keil, you could check your records in that regard.

Please, Mr. Glasberg, continue.

Mr. Glasberg: The second point made was that somehow greater weight should be applied to the opinion of a physician who has perhaps tended to visit with an injured worker on more than one occasion.

My view is that that point is of marginal weight, and I

would really have to reemphasize that you would have have to look at the logic of the medical opinion which was rendered, if the issue is whether a particular event caused a particular injury.

I am going to sum up very briefly and reiterate the four points I made earlier.

A significant period of time elapsed between the date of the back injury and the first record of hip complaint. If there was a connection, one would have expected immediate onset of pain or a much closer temporal relationship.

Second, the fact that complaints were not made with respect to the hip, which were noted by physician over a lengthy period of time, strongly suggests that the complaints were not made.

Third, that it is, in our view, a simplistic approach to simply list medical opinions for and against, and if you have got more for than against you have to allow a particular claim or vice versa.

And the next point is a medical report which purports to link the back injury of 1976 with the hip injury of 1980, when examined closely, are speculative and, thus, should be accorded limited weight.

Because we have medical uncertainties and a genuine disagreement in medical opinions among experts, the adjudicator is forced to consider a variety of other factors. One of those factors is the issue of whether the complaint of the injury which the worker seeks compensation for is related closely in time to a particular accident. A related issue again is whether a complaint is consistent over time.

The final point is whatever caused the exacerbation of the Legg-Perthes syndrome, it was not the accident of 1976. We would submit that a more likely scenario is that this condition would have come on in any event at that particular point in time.

Finally, I want to emphasize that the test is on a balance of probabilities. Did the accident of 1976, which affected the back, cause the hip problem in 1980 and, in our respectful submission, the answer to that question is no.

Madam Chairman: Thank very much, Mr. Glasberg.

Any final questions at this point, or else I will go back to Ms. Keil.

Ms. Keil, could you sum up for us, please?

Ms. Keil: At the risk of repeating myself, this is a difficult case and I cannot make all of the problem areas go away and tie it up into a nice neat package. I wish I could, it would make my presentation much simpler, but that is not the case.

There are disturbing aspects to this case, we admit that, we look for them when we investigate any claim.

However, having said that, the Ombudsman's office feels that the probability goes to entitlement and I think these are probably the salient reasons why. Mr. Glasberg has a problem with the mention of documentation in the four years. That is not insignificant and you should consider is very serious and probably be bothered by it.

However, I would like to point out that Mr. U was 19 years old at the time of the accident. English was his second language, he had a grade ten education and he was not a sophisticated complainant or claimant.

It is also not the case that he did not receive any medication for his pain. He received exactly the kind of medication Mr. Glasberg said. He received anti-inflammatories, and it does not matter whether it was for the pain in his back or not, anti-inflammatories are anti-inflammatories. He received for two years on and off 292s, butone and other stuff that I cannot pronounce. That is in the medical report.

It is also the case that his benefits were cut off in 1977, a year after the accident, and the 20 year-old worker was told there was nothing wrong with him and that he should be back to work.

We are told that he should have gone and complained knowledgeably and accurately and more efficiently about his hip problem when the problem he could identify hurt him got him nowhere.

Now, some people complain a lot about pain, some people complain a little bit about pain, and doctor's sympathies vary. But the point is the man did complain about pain, he was treated for pain and then he was told to go away.

The medical documentation is much sparcer once he had to go away because you cannot submit bills for your medication to the Board because they cannot be granted and you cannot get your doctors treatments paid for, and I would suggest that not all the onus on the reporting of the hip pain goes to Mr. U.

I would also submit that while it is not desirable, it is not what I would have liked, the fact that the family doctor only after the fact said that Mr. U reported a hip

pain does not mean Mr. U did not report hip pain. It meant that the family doctor did not record it. If he wants to take it upon himself after the fact and say: I did not record it, but it did happen, I am not sure we should discount that.

The Board has also raised the question quite legitimately on how strong the medical reports are in favour of a relationship and how, with this problem of continuity, we should take that very seriously into account. I agree.

But the fact remains that Dr. B who treated Mr. U from 1978 to 1982 wrote seven letters of support and he did not have a problem, that he ever mentioned, with this continuity and says: I feel a little more directly than possibly.

Dr. C feels as I do, these symptoms become apparent from the time of the injury. In other words, there was direct cause and effect between the injury reported when he slipped on October 25, 1976 and this man's hip being symptomatic and causing pain.

My submission would be to you that that is not that tentative. Now, with the myriad medical reports on file, I can choose another one that looks a lot more tentative and I can choose ones that are stronger and they are all there in the spectrum. But I think, on probability, there is enough to grant the worker entitlement in this case.

Madam Chairman: Mr. Bell?

Mr. Bell: Other than the initial interview on January the 5th, 1984, had anybody from your office personally met with and interviewed the complainant?

Ms. Keil: Mr. D'arcy Robert, who is sitting beside me, who I rudely neglected to introduce, investigated others in the case and he can talk to you about his contact.

Mr. Robert: I have spoken to him many times, but not interviewed him personally.

Madam Chairman: Other than the interview of January 5th, 1984, had anybody dealt with him in person from your office?

Mr. Robert: One other person from that office up there, yes.

Mr. Bell: When was that?

Mr. Robert: It would have been around the same time.

Mr. Bell: What was the purpose of that, to take further information?

Mr. Robert: Yes, to interview persons who were involved at the same time and in that time period.

Mr. Bell: Okay. We all know how the process works in your office, it is something called a case conference memorandum that is prepared that summarizes the investigation and suggests certain conclusions, opinions and representation to Dr. Hill for him to make the final decision, but who made the decision in your office to accept the evidence, if you will, the story of the complainant?

Ms. Keil: Dr. Hill.

Mr. Bell: Ultimately he did, but who made the decision in staff to recommend to Dr. Hill that the complainant's story be accepted?

Mr. Robert: Which story are you talking about?

Mr. Bell: Whatever the story is.

Ms. Keil: D'arcy and I.

Mr. Bell: The two people in front of us.

Mr. Robert: Based on the medical information.

Mr. Bell: Also, I guess, based on what he said?

Ms. Keil: And the employer's record of accident.

Mr. Robert: The employer's report of accident is very clear on the mechanics of the accident, which is not the same as the interview summary.

Mr. Bell: Just to remind you to give us, whenever you can, the opinion of Dr. B, the February '82 one.

Madam Chairman: I think the one that I would like, if I can, is the family physician statement which seems to be one of the few that recognizes that there might have been immediate onset of a hip problem.

If you can either provide me with the letter or the documentation or whatever that specifically referred to and the earlier the data, the documents, the better, I would suggest.

So if you have both of those.

Any further questions from the committee?

None?

(No response)

I think what I would suggest is that if we can go in camera for a few minutes, and if it looks as though we are not going to resolve this question quickly, we will tell you then and reserve our judgment until Monday, if that is acceptable.

Mr. Lupusella: We have requested documentation from the Ombudsman's office and I do not think that it is appropriate to make a decision before the documentation will be given to us.

Mr. Bell: Can you give it to us now?

Ms. Keil: I think I do have the investigator's report which commented on the family physician's statements.

Mr. Bell: I think I am right. If you give it to the committee and they immediately go into in camera, it is not a going to be a part of the record and disclosed.

Ms. Keil: It is not anonymized.

Mr. Bell: As long as we can get it in as part of the record.

Mr. Charlton: We will be dealing with it in camera.

Madam Chairman: At least this way if we do not come to an agreement....

The committee continued in camera at 4:30 p.m. in committee room 2.

5:00 p.m. (resumption of normal business)

Madam Chairman: We are back on the record now.

The Board in its deliberations was unable to come to a conclusion this afternoon. We request some information from you in making its deliberations.

There is reference to Dr. E providing progress reports to the Compensation Board during the initial complaints and in the investigator's report, the Workers' Compensation Board reveals that Dr. E, in his progress reports to the Compensation Board, indicated that this man was limping.

This is the investigator's report that you handed us, 1983, refers to Dr. E's comments that he did make a progress report to the Compensation Board reference and indicated that the man was limping.

What we would like to see, and as soon as possible, and

perhaps even tomorrow or sometime before Monday, the progress reports submitted by Dr. E to see if, in fact, somewhere in there there is reference to some kind of limping by Mr. U.

Do you think you can provide us with that?

Mr. Glasberg: Certainly by tomorrow. Would you like the names taken out?

Madam Chairman: Yes, I think that would appropriate.

Mr. Glasberg: We will be in a position, I believe, to get them by noon tomorrow, if that is satisfactory.

Madam Chairman: If you can provide that with the clerk's office.

Mr. Glasberg: Certainly.

Madam Chairman: We appreciate that. Otherwise we will reconvene on Monday, January the 25th at two o'clock.

Mr. Bell?

Mr. Bell: Do either the Board or the Ombudsman's office have any objection if the clerk retains custody of these documents given to the committee --

Dr. Hill: None whatsoever.

Mr. Bell: -- in confidence until Monday?

Dr. Hill: None. Go ahead.

Mr. Glasberg: We will require at least a copy of the investigation report that you have provided so that we can then look for the material that you want.

Mr. Bell: Maybe it is better if we make one copy now and the clerk can retain this and give you back the originals.

Madam Chairman: Thank you very much.

Ms. Meslin: Can I assume that we are going to resume with Mr. E on Monday?

Madam Chairman: Yes, the assumption is correct. As soon as we make the decision on this, and hopefully very soon after 2:00 o'clock, we will resume with Mr. E.

If Mr. E is finished before 4:30, we will have open discussion policy matters, but we will not proceed with any more cases on Monday, only Mr. E. Thank you.

The committee adjourned at 5:05 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1986-87
MONDAY, JANUARY 25, 1988



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
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Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:

Johnson, Jack (Wellington PC) for Mr. Pollock

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman

Morrison, Gail, Director, Investigations

From the Workers' Compensation Board:

Glasberg, Irwin, Executive Director, Review Services Department

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Monday, January 25, 1988

The committee met at 2:07 p.m. in committee room 2.

After other business:

2:37 p.m.

Madam Chairman: Thank you and we do apologise for the length in having you stay out of the room.

The Committee has made a decision in the case of Mr. U, and the Committee has decided by a motion to support the recommendation of the Ombudsman as set forth on page 7 of his report made pursuant to Section 22(3) of the Ombudsman Act, and the committee will report this decision to the House in its next report with the recommendation that the Ombudsman's recommendation be implemented by the Workers' Compensation Board forthwith. The Committee expects that the Board will act immediately to implement this recommendation.

Thank you very much for your excellent presentations in that case, and we will be ready to go on to the next case which is Mr. E, and it is under Tab E.

Dr. Hill, would you like to begin with your opening statement, please?

Dr. Hill: Thank you, Madam Chairperson. You have already considered the case of Mr. U and the difficult problem of the connection between one type of injury and an earlier different injury. In the case of Mr. E, you must consider a similar problem.

Mr. E had a back disability, which medical opinion related to his compensable knee injury. The Board was not convinced of the connection and denied Mr. E benefits for the four months in which he was disabled.

Our investigation has revealed that two doctors agreed that Mr. E's back disability could have resulted from his knee injury. A single Board doctor disagreed.

In my conclusion, I have found the Board's decision to deny Mr. E entitlement to benefits unreasonable, and I have recommended that he be granted entitlement for the four months in question.

I am informed by my investigator that the amount of money in question is approximately \$5,500. I ask the

Committee to support my recommendation, and if the Committee does support me, urge that it comment upon the Board's acceptance of a single opinion of one of its own doctors against the evidence provided by two outside practitioners.

While not denying that Board doctors have considerable expertise in the area of assessing disabilities arising from work injuries, I can see no reason why a strictly medical opinion of a single Board doctor should be preferred to the opinions of doctors who have had the benefit of examining the claimant.

I would appreciate the Committee's guidance in this matter, and I now turn over the balance of my presentation to to Miss Gail Morrison, the Director of Investigations.

I thank you, Madam Chairperson.

Ms. Morrison: Good afternoon, committee members. As Dr. Hill has pointed out, this complaint has a number of similarities to the difficult complaint that you have already considered last week and earlier this afternoon. It is the same type of question.

In my view this one is somewhat easier than the one that you have already dealt with. One of the things that is easier about it is that there is not A to H in medical opinions; there is only A, B and C. So there is not a whole lot of confusing medical evidence.

One of the medical reports is the shortest in history. It consists of a single word. So there is not the same kind of complicated medical evidence to consider that you had to consider in Mr. U's case.

Mr. E, a relatively young man, had some back problems in 1975. He lost no time from work. He had physiotherapy, but he had no subsequent problems until he fell and twisted his knee in November, 1980.

He then had more trouble with that knee. As often happens with knee injuries, it gave out on him a few days later when he was getting out of a railroad car at work, and that knee was later to be operated on for a torn meniscus.

Mr. Bell: 'Later' is important, though.

Ms. Morrison: Yes, I will get to that date.

In the meantime on December 8th, 1980, he had back pain again. It was not related specifically to the knee, and, in fact, it was not a serious episode of back pain.

On March 12th, 1981, after a series of medical examinations et cetera, he underwent injury on the meniscus

in his knee. That date is fairly important because it is a date which was inaccurately stated in one of the medical reports, and it probably makes some difference.

As is usual with that type of operation, he was on crutches after his knee operation, and our information suggests that he was on crutches from March 12th, 1981, or as soon as he could get on to crutches after the operation until the mid to end of May, 1981.

He then returned to work on the 15th of June, 1981. He had an onset of back pain following his return to work. He said he had increasing back pain. He eventually laid off work on July 31st, 1981.

There is no question of the genuine nature of the back problem. It has not been suggested that he was making it up. The medical opinions consist of those that are noted in your report, and I will go through them in order.

The first report that is cited in your closing report at page 26 of your tabbed materials is a report from Dr. B.

Mr. Bell: Let us catch up with you.

Ms. Morrison: Okay.

Mr. Bell: Page 26?

Ms. Morrison: Yes. 26th, the final report, the 22(3) report.

Mr. Bell: Okay.

Ms. Morrison: At the bottom of that page, a report of September 4th, 1981. That report states under "Diagnosis," "lumbar disk disease." And under "State why in your opinion," has LDD, lumbar disk disease, symptoms exacerbated by the right knee problem.

Mr. McLean: What page is that on you are reading?

Ms. Morrison: That is at the bottom of page 26 we quoted, and I have got the report which could be copied for you. It is a form report like that, so it is not very complicated or detailed, but that is exactly what it says.

That was from Dr. B who was Mr. E's general practitioner.

Now, the next report that I would like to refer you to is mentioned - just a minute here - is an interview with the same doctor which was carried out by the investigator on the claim, the Workers' Compensation claim.

The investigator in that interview states:

"The doctor indicated the worker has had previous back problems although he himself has not treated the worker in the past. The worker is apparently a relatively new patient so the doctor could not comment as to the severity of his previous problems."

"The doctor indicated that the most recent layoff has been the result of a combination of back and knee problems. The doctor feels that the worker's explanation is a reasonable one and that other patients have developed similar types of disabilities on account of an injury which requires them to place more weight than usual on their back."

So that was an interview dated September 17th, 1981, with the general practitioner. If you are following along in the report that is in the middle of page 27.

In the next paragraph, you will see that the file was referred to Dr. C, a Workers' Compensation Board surgical consultant, for his review of the matter. He was asked the following question: "The Review Branch would appreciate your opinion re merits of claim for low back disability," noting memo no. 18. Memo no. 18 is just a summary of the information to date.

"The complainant implicates right knee problem, meniscectomy, shifting of body weight to the left side, aggravated left back."

In this contention he appears to be supported by Dr. B: "Is this a reasonable medical proposition?" End of request.

The answer to that request was a simple "No," signed by the Board's surgical consultant.

Mr. Bell: Is that surgical consultant an orthopaedic specialist?

Ms. Morrison: Sorry?

Mr. Bell: Is that surgical consultant an orthopaedic specialist? Irwin, was he?

Mr. Glasberg: I am advised he is an orthopaedic surgeon.

Ms. Morrison: The other reports on the file are reports from Dr. A who was the specialist who dealt with Mr. E's knee problem. His report to the Board dated July 27, 1982, is partly quoted at the bottom of page 27. I can read the full letter if you would prefer. In any case, I will read a few excerpts which have not been excerpted in the report.

"At the request of Mr. E, I reviewed his file vis-a-vis a relationship between his injured knee and injured back. Mr. E states quite clearly that at the time of the knee injury, he recalls the back becoming uncomfortable shortly afterwards and becoming increasingly more painful approximately three weeks following the injury.

"He also notes that he had trouble with his back six or seven years ago, which has settled down, and he has had no significant interval trouble, if trouble at all, until that period following the injury to his knee.

"When I saw him last in August, 1981, my notes would indicate that I thought he had a mechanical problem superimposed on an evident longstanding lumbar disc space loss at the L-5, S-1 level."

And then the paragraphs that you have quoted in the report appear:

"There is indeed a high probability that this gentleman sustained an aggravation to a pre-existing and asymptomatic pathological state to his lumbar spine at the time which he sustained the knee injury..."

"The physiotherapy and crutch-walking would certainly put an increased strain on the lumbar spine, and I would suspect that making a claim on the basis of aggravation may very well be justified...."

In addition to that report, Dr. A also wrote to Mr. E saying, "I would suggest --" as you see at the top of page 28:

"I would suggest that aggravation of a pre-existing lesion is certainly a reasonable and justified grounds for claim and appeal...."

The sum of the medical information is therefore that of Dr. A, who is the person who did -- the specialist who did the knee operation, and the general practitioner, both of whom gave evidence that the back problem resulted from the knee problem and the Board's surgical consultant's view that there was no relationship, a simple "No."

As you can see from the report, we wrote to the Board our usual 19(3) letter and requested a response. The main response of any kind you will see is a response to our 22(3). As our process of discussions with the Board went on, we did not have a formal response to the 19(3), but we do have a formal response to the 22(3). It is at page 36 of your materials.

I should emphasize that we are talking here about an underlying disability which is aggravated by the knee problem. It is important to know that we are talking about an earlier back problem which was aggravated by this knee problem.

One doctor relates it to crutch-walking. It appears that the change in the way the weight is distributed when he had the knee problem was thought by the doctors to have aggravated his underlying disability.

We are asking for or recommending entitlement for a relatively short period. We have found that the medical evidence supports entitlement for the period from July 31st to December -- sometime in December of the same year. This is not a long period of disability, but we feel that the evidence that was before the Board and certainly the evidence on our file would support the connection between the knee problem and the resulting back difficulties which disabled the worker over the period from July 31st until December.

Mr. Bell: Ms. Morrison, the complaint of back pain in December, 1980 -- have I got the right date? Right year? December the 8th? How do you address that? What caused that?

Ms. Morrison: Sorry. The complaint of back pain in December?

Mr. Bell: He woke up from a nap at work on December the 8th, 198--

Ms. Morrison: Right.

Mr. Bell: -- almost three weeks after the accident that caused the twisting of the right knee and again almost three weeks after his knee gave out.

Ms. Morrison: I think --

Mr. Bell: What I am not sure of, he was diagnosed as having a tear of the medial meniscus. I am not sure you have told us in the report when that diagnosis was made, but in any event what do you say caused the December 8th, '80 pain? Because the Board puts a fair bit of stock in that event and says, as I understand their position, 'Well, there couldn't have been much limping or there were not any crutches --'

Ms. Morrison: At that time.

Mr. Bell: '-- at that time, yet he woke up with it.' And, by the way, six years earlier he woke up with it so it was caused by something else. What do you say about the

December 8th episode?

Ms. Morrison: I do not think we have information that says that it was necessarily related to the knee -- to the fall, although I think Dr. A does mention something about the onset of that problem in December.

It was he woke up with a back problem. It was shortly after he had had the fall. It is not unlikely that it might have been related, but I do not think we have any strong opinion that it was. It was not a disabling back problem. He woke up with pain. Perhaps it was the kind of pain anybody could wake up with, but we do not have a strong connection between that waking up from a nap at lunchtime with a back pain.

Mr. Bell: Well, it...

Ms. Morrison: It could have been related to the fall.

Mr. Bell: Well, if it was not, if in the perfect world of hindsight if it was not, would it make any difference to your opinion and recommendation?

Ms. Morrison: I do not believe it would, because we have medical opinions which strongly relate the later back disability to the leg problem. The knee problem was not the same in December as it was later on. Once he had the operation and was on crutches, the caring of his weight would have been quite different than the usual way he would do it.

The doctors have related his later back disability to that period of problems with his knee. It does not seem to me to make that much difference whether we can explain the December back disability since the doctors are not tying the later back disability to the earlier knee problem.

Mr. Bell: Dr. A's participation in all of this, did he ever examining the complainant?

Ms. Morrison: Dr. A?

Mr. Bell: A.

Ms. Morrison: Yes. Dr. A was the surgeon who operated on his knee.

Mr. Bell: All right. And the family physician certainly has attended it.

Ms. Morrison: Yes. The only person who did not examine him was the Board doctor.

Mr. Bell: The guy who gave the "no" opinion?

Ms. Morrison: That is right.

Mr. Bell: Okay. I have no further questions, Madam Chairman.

Madam Chairman: Yes, Mr. Philip?

Mr. Philip: I wonder if you could tell me how long the 19(3) letter was not responded to. So what is the next date on which you get any response from the Board? Your 19(3) letter goes out on May the 7th. There is a response, I gather, following that in July from the employer but not from the Workers' Compensation Board?

Ms. Morrison: That is correct.

Mr. Philip: Would the Workers' Compensation Board have sent you that letter or the employer sent you the letter directly?

Ms. Morrison: The employer would send it directly.

Mr. Philip: Okay. And what is your procedure when you do not receive a response to a 19(3) letter?

Ms. Morrison: Well, as you will see, by September 11th, 1986, having not received a response to the 19(3), the letter on page 24 was sent to the Board saying, 'We will now go forward with our process.'

Mr. Philip: Can you tell me, is this happening increasingly or how often do you run into this kind of lack of response? You are going -- you know, May, June, July, August, September. Four months later then you write and say, 'Look, you guys, if you do not want to respond then I guess we are going to have to do something about it,' but you have got a four-month delay in there.

Ms. Morrison: To be fair to the Board, we had ongoing meetings with the Board about various complaints. I do not have in this chronology any indication of whether they said to us, 'Look, we will get to that one in a few months.' It has been the case in a number of those that we have brought to you this time, however, that we have foregone a response to the 19(3) and gone directly to the 22(3) report because no response was available from the Board in a timely manner.

Mr. Philip: Would there be instances, because of the dialogue involved in the conferencing sort of system where you would actually indicate that the response to the 19(3) letter was not necessary because you were, in fact, still conferencing with the Board on a particular case?

Ms. Morrison: Yes.

Mr. Philip: So this lack of response may not be negligence on the part of the Board; it may be an agreement between and you the Board?

Ms. Morrison: In a number of cases -- of course if they turn out well and we end up agreeing and no 19(3) letter is necessary, then you do not see this type of thing. The fact that we have ongoing discussions with the Board and some of them do not get resolved means that the time taken in discussing all of these cases will look like a serious gap here in correspondence.

Mr. Philip: So what I am hearing you say is that we should not necessarily be overly critical because the Board did not respond to your 19(3) letter, that it may be because of other reasons.

Ms. Morrison: There may have been. We certainly would like not to say that we do not ever need responses to the 19(3)s.

Mr. Philip: I guess what I am concerned about is the process, that if there is a process set up, I would like to see -- it is very difficult for me as a legislator to decide when there is a breaking down of the process unless there is some kind of notation, and I find this difficult because I do not know whether the lack of response was justified, was by consent or, in fact, was a breakdown in process?

And perhaps we can discuss that during the Ombudsman's estimates or something like that, and we might make a note of that to see whether or not there is some reason why we should be concerned about this or whether it is just part of the dynamics of the way in which this Ombudsman consults and tries to reach consensus rather than working through a more polarized sort of system.

On page 27 you talk about the physiotherapy and the crutch-walking. Can you give us some indication of how long he was "crutch-walking"?

Ms. Morrison: My information is that he had the operation in March and he was on crutches until mid-May to the end of May. We are not sure of the exact date on which he did not need the crutches any longer.

Mr. Philip: So we are talking about three months?

Ms. Morrison: Two months. Two or two and-a-half months.

Mr. Philip: Two and-a-half months. And it appears then that from Dr. A that in his opinion crutch-walking for two

and-a-half months combined or possibly multiplied by the physiotherapy -- physiotherapy would have been going on during that two and-a-half months as well, would it?

Ms. Morrison: Yes, although his physiotherapy continued after he was off crutches. He was still having physiotherapy during June and July.

Mr. Philip: Okay. And at any time did you have any indication that the rather brief response by Dr. C was followed up in any way by the Board to obtain additional information or reasons for the "No" answer?

Ms. Morrison: Yes, we do. Hold for a moment. At the very end of your documents, you will notice that there is a memo 51 which is a memo from Dr. C.

Mr. Philip: Okay. So that was March 30th, 1987, and the decision against Mr. E was on what date?

Ms. Morrison: The decision -- hold on. Decision April 11th, 1983, was the Appeal Board decision. That was the decision complained of.

Mr. Philip: So the decision was made without the information of memo no. 51 then?

Ms. Morrison: The memo that we were provided with as part of the Section 22 response was dated March 30th, 1987, because he was asked at that point by the Ombudsman administrator to review the x-rays, and that is a memo in response to that request.

Mr. Philip: So basically memo 51 is post facto the decision and is, in fact, an elaboration of why he, in fact said "No"?

Ms. Morrison: Yes. It is his review of the x-rays in his opinion that they are still "No."

Mr. Philip: But when the "No" decision was taken by the Workers' Compensation Board, they would not have had anything other than the "no"?

Ms. Morrison: That is right. That is right.

Mr. Philip: Is that correct? Thank you.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Parts of my question have been raised by the previous speaker, which was the length of time Mr. E was using the crutches, which was more or less two months and a half --

Ms. Morrison: Two to two and-a-half months, that is right.

Mr. Lupusella: Now, do you have that information on file or any statement from the claimant how many hours a day he was using the crutches?

Ms. Morrison: He had to use the crutches to walk.

Mr. Lupusella: Well, you cannot use the crutches twenty-four hours a day.

Ms. Morrison: No.

Mr. Lupusella: We you have a more or less --

Ms. Morrison: We do not have any information as to how many hours a day, no.

Mr. Lupusella: Okay.

Madam Chairman: Mr. McLean?

Mr. McLean: Thank you, Madam Chairman. On page 11 Mr. E advised the Workers' Compensation Board that he experienced previous back problems approximately six years prior to this incident.

Ms. Morrison: Right.

Mr. McLean: But received physiotherapy for a short period and lost no time from work.

Ms. Morrison: Right.

Mr. McLean: Would it be possible that he had a deteriorating back and that after he had his knee injury that that is when he claimed about his back again?

Ms. Morrison: That is correct.

Mr. McLean: But there could have been possibly that that back injury had been still bothering him, and the fact that he had this other injury was probably an opportune time to complain about the back problem?

Ms. Morrison: Well, he had had no complaints of back problems in the interim in the six years and there has been none since. The claim for compensation is a claim for aggravation of a pre-existing condition which disabled him for a short period of time. He was disabled from July 31st to December -- well, whatever the date is.

Mr. McLean: I have a problem. He says that when he had had his nap on December the 8th -- that was right after the

accident, and then in memo 51, you will note that this x-ray was ordered about six weeks after the patient's industrial injury to his knee, and yet there is no mention of any back problem this time.

Ms. Morrison: That is right. That incident of back pain in December was brief and not apparently part of this review. It was just he woke up with a sore back.

Mr. McLean: Yes. Thank you.

Madam Chairman: Thank you. Mr. Johnson?

Mr. Johnson: Yes, Madam Chairman. Page 27 in relation to Dr. C.

Ms. Morrison: 27?

Mr. Johnson: Yes. The Review Branch asked Dr. C whether or not this was a reasonable medical proposition --

Ms. Morrison: Right.

Mr. Johnson: -- and he stated quite simply "No." He never at any time examined the individual?

Ms. Morrison: No, he had not examined the worker.

Mr. Johnson: And he had never looked at x-rays at that time?

Ms. Morrison: Not at that time.

Mr. Johnson: And it was not until March 30th, 1987, several years later, that he looked at them?

Ms. Morrison: He looked there at what I think was the x-ray report on March 30th, 1987 -- not the x-ray.

Mr. Johnson: In 1987. But in 1981 when he made this statement that was a blunt "No," he never had the benefit of examining either the individual or looking at any x-rays?

Ms. Morrison: That is right.

Mr. Johnson: How would he draw on the assumption that it could not have happened?

Ms. Morrison: He just gave his opinion in answer to the question he was asked, which is: Is it a reasonable contention that the back disability is connected to the knee problem, and he just said "No."

Mr. Johnson: Was he aware that two other doctors had indicated that there very well could be a relation?

Ms. Morrison: The request to him I think was based on the complainant's contentions, not the doctor's report. The request just said the complainant implicates right knee problem, shifting of body weight, left side aggravated left back.

No, it does say, sorry. It does say in this contention he appears to be supported by Dr. -- and that would have been Dr. A. And the question asked of this consultant is: Is this a reasonable medical proposition? And his answer is "No."

Mr. Johnson: Knowing that two doctors stated that, in his opinion they were in error?

Ms. Morrison: He just said, "No."

Mr. Johnson: And he is the doctor with the Workers' Compensation Board?

Ms. Morrison: That is right.

Mr. Johnson: Is this usual procedure?

Ms. Morrison: I think you should ask the Board that. I would not be able to answer that.

Madam Chairman: Any further questions? Yes, Dr. Henderson?

Mr. Henderson: Do I understand that what is actually considered to have caused the exacerbation of the back problem is the limping and the crutches?

Ms. Morrison: That is the Dr. B's opinion, that it is most likely related to the uneven gait, the shifting of weight. He says the crutch-walking and physiotherapy.

Mr. Henderson: Well, is there anything it could be due to that would relate it to the accident? Or is the alternative to that just assuming that it was a regular progression of back disease?

Ms. Morrison: That would relate to the accident?

Mr. Henderson: Yes. Degenerative disc disease would not in itself lead to entitlement; right? It is only the accident caused and exacerbation of it?

Ms. Morrison: It has to have arisen in a work -- yes, been exacerbated in a work situation.

Mr. Henderson: But the argument is not that the accident led to the exacerbation; the argument is that the

treatment of the accident, namely the crutches and a symptom of the accident, namely the limp, led to an exacerbation of the --

Ms. Morrison: That is a sequela, yes.

Mr. Henderson: Okay, that is what I was wanting to clarify.

Madam Chairman: Mr. Bossy?

Mr. Bossy: Just to follow on that concerning this crutch-walking, and Dr. A is recorded as having stated to the investigator -- or reported to you whereby Dr. A says crutch-walking would certainly put an increased strain on the lumbar spine. And then this opinion a being refuted because Mr. E states in the investigator's notes from October the 1st, 1981, when discussing his low back pain aggravation that while he was on crutches he was symptom-free until after returning to work on June 15th.

So that the crutches at that time that he was using, if they were aggravating the pain, should he not have reported then that the problem with his back causing from these crutches? But if he was pain-free or symptom-free, it seems strange that then there is any relation put to the crutches.

Ms. Morrison: I think that is a difficult question. It is not absolutely clear, to me at least, that he did not have any back pain during all of that time. But supposing he was symptom free --

Mr. Bossy: He stated that he was symptom-free.

Ms. Morrison: Where is that?

Mr. Bossy: That is on page 22, number 14.

Ms. Morrison: Sorry?

Mr. Bossy: Page 22.

Ms. Morrison: Yes. This is in the employer's response?

Mr. Bossy: Yes.

Ms. Morrison: I think there is one possible answer to that. And I am not a medical person so I do not really know how these things work out, but it seems to me that when you are walking on crutches and not putting your weight on your leg or on your feet, you may not have the same pain caused by putting your weight, by supporting your weight, as you would after you finished using the crutches and try to regain the strength of your leg.

We have discussed this at some length and certainly it would seem from the doctor's report that he feels that the physiotherapy and the crutch-walking somehow increased the strain on the spine whether or not there was pain while that strain was on the spine. And --

Sorry. I have just got a note from Martha here. Her information suggests that the WCB investigator's note did not state that there had been any complaint of pain during the crutch-walking, but the complainant himself has told us that he did have pain during that time. So that the quoted --

Mr. Bossy: It says though that he discussed -- when discussing his low back pain aggravation that while he was on crutches, he was symptom-free until after returning to work.

Ms. Morrison: Certainly that is what the investigator, the Workers' Compensation Board investigator, reported which the employer is then reporting to us. Mr. E himself told us that he did have pain while he was on crutches.

Either way, the doctor has connected the subsequent back problem with some strain that occurred to the back during the time that he was on crutches.

Mr. McLean: He had pain six years before that?

Ms. Morrison: That is right; he did. He did not lose time from work. He had a problem with his back. He had it treated with physiotherapy six years earlier and he had no problems from then until this leg problem.

Madam Chairman: Any further questions at this point? No? Did you have anything else to say, Ms. Morrison at this point?

Ms. Morrison: Not at this time, thanks.

Madam Chairman: Thank you.

Mr. Glasberg, do you have a few comments to make?

Mr. Glasberg: Thank you very much, Madam Chairman.

I think it might be useful to very briefly trace the relevant historical facts. Now, I guess the discussion would start with the worker's degenerative disc condition.

He did suffer a previous back injury in late 1975 which continued until March, 1976. With respect to the 1975 incident, the worker underwent physiotherapy for a period of three and-a-half months.

In addition, the investigation report indicates that Mr. E complained of back pain for a number of months following the December, 1980, non-compensable accident. This information suggests that the worker's pre-existing disc disease was not insignificant.

The worker had surgery for his knee problem in March, 1981, at which time his back problem ceased. According to the Ombudsman's office, the worker was on crutches for at most two months after the surgery. This would have put him off crutches sometime in mid-May, 1981.

Although the issue of the time spent on crutches is not addressed in the file, the finding of the individual being on crutches for two months seems curious since for this type of injury I am advised that the worker or the patient would generally be on crutches for a few weeks only. So it seems to be a curious finding that he would be on crutches for an extended period of time.

Mr. Bell: How is a few weeks different than two months? How is a few weeks different than two months?

Mr. Glasberg: Well, the significance is that it will be our argument that the worker did not complain of any back pain subsequent to the operation until he was in a position to return to work, and it would seem that if the Ombudsman's theory is correct, then you would have expected the worker to complain of pain while on crutches, not weeks or months after he had been off crutches. And that is a significant point.

Mr. Bell: Except that, to just pick up on a word you used, the Ombudsman does not have a theory. The Ombudsman has got an opinion which is supported, he says, by two physicians.

Mr. Glasberg: I should rephrase that. It would be Dr. A's theory, which, I suppose, is supported in a different sense by Dr. B.

In any event, it appears that Mr. E had been off his crutches for a significant period of time when it is alleged that he first complained of back pain.

Now, there is some question as to when the first report occurred. Apparently the injured worker complained to the Ombudsman that the onset was on June 15th, 1981. The Appeal Board in its decision concluded that Mr. E did not complain of back pain until the date of his layoff, which was July 31, 1981, and that latter interpretation is confirmed by the employer medical records.

The key issue for determination may be set out very succinctly. Is it more likely that Mr. E's back problems in

the summer and fall of 1981 were caused by, one, his pre-existing back condition? Or, two, the use of crutches after his knee surgery? That is the issue before you.

What is the evidence in favour of the proposition that the pre-existing lumbar disc problem precipitated the back problem in 1981? Quite simply, Mr. E had suffered back problems on two separate occasions in the past from 1975 to 1976 and again in late 1980.

If the problem had manifested itself at two distinct points in time over a five-year period, then it could be argued strongly that the pain arose from the same cause in 1981.

What is the evidence in favour of the proposition that the use of crutches caused the back condition? Really, I think it boils down to the key piece of evidence being the medical opinion rendered by Dr. A, who is an orthopaedic surgeon. Since the Ombudsman's case largely turns on this piece of evidence, I want to quote the opinion in full.

"At the request of Mr. E, I reviewed his file vis-a-vis the relationship between his injured knee and injured back."

Mr. Henderson: Do we have that here and what page is that?

Mr. Glasberg: I do have that opinion.

Mr. Henderson: Okay. Sorry.

Mr. Bell: For members of the Committee, there is a some part of that report referenced at the bottom of page 27 of your file. At the bottom of page 27. Ms. Morrison has already read a good part of it. If Mr. Glasberg wishes to read it all, we now have it.

Mr. Glasberg: I think I would like to have quoted the part that is not excerpted in the written materials because I think that is --

Mr. Philip: Why don't you just hold on until we have a copy.

Mr. Bell: I think we have all got a copy.

Madam Chairman: Continue.

Mr. Glasberg: It is really the second paragraph that I would like to read, and I am quoting:

"In a letter to me of May 3rd, Mr. E states quite clearly that at the time of the knee injury, he recalls

the back becoming uncomfortable short afterwards and then becoming increasingly more painful approximately three weeks following the injury. He also notes that he had trouble with his back six or seven years ago which has settled down, and he has had no significant interval trouble at all until that period following the injury to his knee."

Now, the opinion contains two key propositions -- causal propositions, let us call them. The first is that:

"There is indeed a high probability that this gentleman sustained an aggravation to a pre-existing and asymptomatic pathological state to his lumbar spine at the time which he sustained the knee injury. As he explained the graduation of symptoms, it is entirely probable."

That is the doctor's quote.

The problem with this statement is that it is based on an erroneous understanding of the facts as supplied by the injured worker.

First, Mr. E advised the physician that at the time of the knee injury, the back became uncomfortable. This proposition, however, directly contradicts Mr. E's own statement to the Board where he indicates that he did not experience any back pain at the time of the knee injury or in the days following.

Second, Mr. E apparently indicated to the physician that following the knee injury, the back condition came on gradually. I make this inference from reading the second last paragraph on page 1 of Dr. A's opinion.

Again, however, the proposition that Mr. E's back pain emerged gradually directly contradicts the worker's own statement to the Board that his back pain came on suddenly when he arose from a nap on December, 8th, 1980.

The Board's submission is that since Dr. A's opinion that the worker's back pain was related to the November 30 knee injury is based on an improper factual base, it must be discounted all together.

Madam Chairman: May I interject here for just a moment, please. Mr. Charlton?

Mr. Charlton: I think I hear what you are saying. I think there is one major flaw in this theory that you have just thrown at us in terms of why we should reject Dr. A's opinion entirely.

And I note how -- and I guess we all do it; the

Ombudsman's office does it, the Board does it, and each of us probably does it from time to time in our political lives as well -- how we quote the sections of the reports that we like to use and ignore the sections of the report that we do not like.

And I refer you to paragraph 3 of the report to which you were just referring where Dr. A clearly states that

"When I saw him last in August of '81 --"

before any of this so-called improper information had been fed to Dr. A, the improper information which you are asking us to totally reject his opinion based on, he clearly says:

"When I saw him last in August, 1981, my notes would indicated that I thought that he had a mechanical problem superimposed on an evident long-standing lumbar disc space loss at L-5, S-1."

In other words, Dr. A identified this problem a year before the letter of the 3rd of May or almost a year before the letter of the 3rd of May, and it is there in his records. So how can you ask us to totally discount his evidence?

Mr. Glasberg: Well, I look at the third paragraph and all it tells me is that essentially the orthopaedic surgeon has concluded that the worker has a disc condition.

Mr. Charlton: No, no. A mechanical problem superimposed on a disc condition. And the problem he is describing later on with the crutches is the mechanical problem that he is referring to.

Mr. Glasberg: I am really uncertain what the term "mechanical problem" means. I would not think it relates to the crutches.

Mr. Charlton: Well, I think it relates in the context that he has written this letter.

Madam Chairman: Mr. Bell?

Mr. Bell: Can we get right down to the nitty-gritty. The Board just does not believe this worker, does it?

When he says to whomever - and we know he said it at least to one of the doctors and he said it to the Ombudsman's investigator - that sometime, to use the doctor's language purporting to quote him, 'shortly afterwards and then becoming more increasingly more painful three weeks following the injury, I experienced back pains,' the Board does not believe him.

Mr. Glasberg: I would not say that the Board would

reject this claim on the basis of a lack of credibility on the part of the injured worker. I think that there were different reports or different information supplied to the Board investigator than was supplied to the Ombudsman's office. I think that that is one factor which this Committee must consider in determining whether to accept the Ombudsman's recommendation.

There are other issues. For example - important issues - for example, did the injured worker complain within the relevant period of time? It could be argued that if the individual was having back pain, he ought to have complained to the physicians who were taking care of him; that is another factor that has to be taken into account.

And the third factor is how much weight is placed on a medical opinion which to some extent could be construed as speculative.

So there are a variety of factors which I think have to be taken into account, and I do not simply think it is a matter of the Board indicating that, 'We do not believe this injured worker.'

Mr. Bell: You have told us everything now of the reasons why the Board rejects the opinions of Dr. A or the word you used a few minutes ago, the 'theory' of Dr. A?

Mr. Glasberg: Well, I think there is more that I want to say about the failure to complain when it would have been expected.

Mr. Bell: I am talking about Dr. A right now. Are there any more reasons why the Board rejects Dr. A's opinion?

Mr. Henderson: Could I ask a question relevant to that?

Madam Chairman: Dr. Henderson?

Mr. Henderson: Maybe I am just a little confused or maybe there is something here that is confusing me. I am not sure which it is.

It seems as though Dr. A is recalling - or somebody is recalling - that the back problem -- somebody is recalling that the patient remembered that the back problem began shortly after the injury, the knee injury, but that is not when the crutches were being used. I gather from this the crutches were being used some months later when he had surgery.

Mr. Glasberg: That is correct.

Mr. Henderson: So if Dr. A says the patient now

remembers the back became uncomfortable shortly after the knee injury, unless by "shortly" he means three or four months, he cannot also say that it is because of using crutches. It has got to be one or the other.

Mr. Glasberg: I think that is right.

Mr. Henderson: Now maybe the patient was just kind of sloppy in the way he described it, but if we are to take Dr. A's statement in the second paragraph that Mr. E states quite clearly that at the time of the knee injury he recalls the back becoming uncomfortable shortly afterward, bearing in mind that shortly afterward he was continuing to work and he worked for another three or four months - continued in his job for four months, approximately - then the statement in the one, two, three, four -- fifth paragraph, that the physiotherapy and the crutch-walking would put an increased strain on the lumbar spine - and I would suspect that making a claim on the basis of aggravation may well be justified - that does not follow at all, unless by "very shortly" he means four months, and I do not think that is what, stating clearly, what it was "very shortly" really means.

Mr. Glasberg: I would interpret the back becoming uncomfortable shortly afterwards as meaning the next few days or the next week because the sentence goes on by indicating, "and then becoming increasingly more painful three weeks following the injury," which would have been the non-compensable back strain when he got up from the nap on December 8th, 1980.

Mr. Henderson: Well then it seems to me that that diminishes the emphasis one would want to put on crutch-walking because he was not walking on crutches then, was he? He was continuing to work.

Mr. Glasberg: I think -- I wanted to raise that point because you have got the suggestion in Dr. A's medical opinion that there is this apparent work relatedness between the onset of back pain and the knee injury. And if that proposition is not right, then I would think there is a good chance that the opinion rendered by this physician would be different.

Madam Chairman: Mr. Johnson?

Mr. Johnson: I am at a loss to understand the comment you made in response to Mr. Charlton. It is in relation to Dr. A's letter in paragraph 3 and the mechanical problem.

Did I understand you to say that you are not sure what Dr. A meant by "mechanical problem"?

Mr. Glasberg: Frankly, I think it may be a medical term of art, and I am uncertain what it means.

Mr. Johnson: Well, the Board accepts Dr. A's letter as evidence to base his facts on, and yet you are not sure -- at least you say that you are not sure -- does anybody in the Board understand what it means?

Mr. Glasberg: Just to clarify, Dr. A is an external physician whose report was employed by the worker to substantiate his claim.

We do have a physician in the audience, and I can ask him what the term, "mechanical problem" typically means.

Mr. Johnson: I do not wish that because the decision is being made based on what is before us, and I would have thought that you would have asked that question at the time it was presented; not after the fact.

Mr. Glasberg: Well, with the greatest respect, I do not see how the third paragraph in Dr. A's letter really assists much in terms of deciding whether this latest exacerbation of the back problem is due to the pre-existing injury or to the knee accident.

Mr. Johnson: I think to determine that we would really have to know what Dr. A meant by "mechanical problem."

Mr. Johnson: I agree entirely, and I --

Mr. Johnson: Well, why would that question have not been raised at the time that the assessment was made?

Mr. Glasberg: Well, again, it seems that, the gentleman had a mechanical problem superimposed on an evident long-standing lumbar disc loss. Now, the relevant date would be August, 1981, and I guess that the individual at that point in time would have left --

Mr. Johnson: Madam Chairman, that is getting beyond what I was asking. I asked a question; I did not get an answer to it. I submit that Dr. A has made a statement. He has made some observations that none of us are sure what he meant.

Dr. C, I think, has stated using just one word, "No." Would it appear that the Board likes simple, clear, precise words?

Mr. Glasberg: Well, I can tell you quite categorically that a medical opinion of that nature would no longer be acceptable to this organisation.

Mr. Johnson: The "No"?

Mr. Glasberg: Absolutely no longer acceptable.

Mr. Lupusella: That is why, with respect, "mechanical problems" with the back is widely used by orthopaedic specialists, and I think that Mr. Johnson would like to know the definition of what "mechanical problem of the back" is all about. And it has to do with movements of the back and disc protrusion might cause a mechanical problem of movements of the back.

I mean, that is what it is all about. An impediment of free movement of the back; that is what it is all about.

Mr. Johnson: Mr. Lupusella, I am not getting into the technical aspects or the medical terminology. I was simply pointing out that I think people making decisions should know what they are basing their information on -- facts on.

Madam Chairman: Thank you. Mr. Charlton?

Mr. Charlton: Yes. We just had some questioning from Mr. Henderson, and I think it, to some extent, was following down the wrong road in terms of the question of the period that we are trying to claim for here, and what the doctors are saying was the onset of that period proclaimed.

Mr. Henderson was making reference to Mr. E's comments about discomfort as opposed to the disabling period that we are talking about here now whether or not the onset of back problems shortly after the accident and in December of 1980 it was for a very short period and was not disabling, and the gentleman continued to work, as I understand it.

What we are talking about here is something other than a normal back ache for which this worker was, in fact, disabled for a number of months; is that not correct?

Mr. Glasberg: The period of compensation being claimed is, I believe, from August to December of 1981.

Mr. Charlton: July 30th to December --

Mr. Glasberg: 1981.

Mr. Charlton: Correct.

Mr. Glasberg: That is right.

Mr. Charlton: But we are talking about a disabling injury at that point which, in fact, was severe enough to stop the gentleman from working. That would be the basis of the claim as opposed to a period when he had discomfort in his back in the fall of 1980, a year earlier, which did not disable him, through which period he continued to work.

Mr. Glasberg: Well, the one qualification I would make

is that we do not know whether this individual could have worked during, I guess, the summer of 1981 because his plant was on a layoff at that point in time. I mean, he had worked through in 1980 when he was suffering back pain, so I am uncertain whether he would have had to leave work in 1981 or whether he would have continued.

Mr. Charlton: What do his doctors say in the report of the claim on your file?

Mr. Glasberg: Yes, you are quite right; they did confirm that he was disabled.

Mr. Charlton: He was temporarily totally disabled during that period of time?

Mr. Glasberg: During that period of time.

Mr. Charlton: Thank you.

Madam Chairman: Mr. Philip? Dr. Henderson?

Mr. Henderson: He was disabled but on the basis of the knee, not the back; right?

Mr. Glasberg: Well, he claimed that --

Mr. Charlton: This is after the operation his knee is now fine. He is doing physiotherapy.

Mr. Glasberg: The worker was paid compensation for the knee accident which was clearly work-related. That was the earlier period in question.

The issue now relates to whether the onset of back pain in a later three-month period of time is related to the pre-existing disc condition or the worker's use of crutches and reliance on physiotherapy which resulted from the compensable knee accident.

Mr. Henderson: My comment I think was simply that the fact that he had some back pain right after the accident is not very relevant to that unless you feel that the accident upset his back and then that got better and then the crutches upset it again. Maybe that is --

Mr. Charlton: That is essentially what I am saying and it seems to me what he is saying as well that he at no time has claimed that he was disabled by the back discomfort in the fall of 1980. In fact, he continued to work, did not try and make a compensation claim when he had back discomfort, and perhaps that can be associated to his ongoing pre-existing condition of back problem.

What we are trying to determine is what it was that

totally disabled him for a four-month period or a three and-a-half month period.

Madam Chairman: Dr. Henderson, did you --

Mr. Charlton: -- from back problems.

Mr. Henderson: I must say the difficulty I am having with this partly stems from the fact that I have a hard time seeing how crutch-walking, which takes weight off the spine I would think -- and if there is an orthopaedic expert here, I would be happy to be corrected on that --

Mr. Charlton: There is a report from one here.

Mr. Henderson: Yes, but I do not think he is addressing the point that I am making and that is that crutch-walking takes weight off the spine. It is hard for me to see how that is going to as exacerbate a back problem. The injury might, but that is not the argument that is being made.

Mr. Philip: Well, physiotherapy might put pressure on the back, would it not?

Mr. Henderson: Well, I mean, in the same sense that sort of rolling around in bed or leaning over to pick up a cigarette might, but I do not --

Mr. Philip: But physiotherapy is a much longer more intensified of procedure than rolling over a bed.

Mr. Henderson: Physiotherapists have skipping and jumping and bouncing on his feet or something maybe, but I do not see how physiotherapy of a knee is going to make a back problem worse.

Mr. Philip: Well, there would be leg raising with physiotherapy, would there not? -- for the knee?

Mr. Henderson: Straight leg raising? I do not know. You are taxing my knowledge of physiotherapy but straight leg raising does not do anything to the knee. If you are working with the knee, you work with a knee joint. Straight leg raising is the hip joint.

Madam Chairman: We have all learned a great deal about physiotherapy at this point. Was there a question that remained unanswered in your statement, Dr. Henderson?

Mr. Henderson: No. I guess we are actually getting into discussion, Madam Chairman, which we are not supposed to be doing. I will leave it at that.

Madam Chairman: Any further questions at this time? I do believe Mr. Glasberg has a few more points to make. Do

you have any as well?

Please continue.

Mr. Glasberg: Thank you, Madam Chairman.

I would now like to deal with the second hypothesis contained in Dr. A's opinion, and I am here quoting:

"The physiotherapy and crutch-walking would certainly put an increased strain on the lumbar spine, and I would suspect that making a claim on the basis of aggravation may very well be justified."

The overriding difficulty with this theory though is that while Mr. A. was on crutches, the file does not indicate that he ever complained of pain or discomfort. In fact, in the notes of the Board's investigator dated October 1, 1981, Mr. E indicates that he was symptom-free until returning to work on June 15, 1981.

This fact is, I suppose, confirmed by Dr. A's own examination of the worker on June 2nd, 1981. This is two weeks before Mr. E was to return to work. In his report of the examination, Dr. A writes, and I am quoting:

"Mr. E came to see me on June 2nd with little trouble in the knee except for some discomfort in going up and down stairs. My examination then showed no effusion, excellent quadriceps and a good range of movement."

What is significant about this progress report is that, one, there is no reference to back pain, and, two, no mention of limping. From this evidence, the only conclusion available, in my submission, is that Mr. E's back pain came on well after he had been off crutches.

Now, a further theory advanced is that somehow Mr. E's limping either before or after this surgery - it is unclear - caused the back problem to re-emerge. As far as the pre-surgical period is concerned, it is worthwhile to point out that Mr. E did not experience any back pain immediately after the knee injury when his limping would be expected to be most pronounced.

Now let us have a look at the post-surgical period. Significantly, none of the medical reports on file including the one provided by Dr. A of the June 2nd, 1981, examination make reference to this complaint. In addition, even if lifting had been reported, the Board's senior surgical consultant, after having reviewed Dr. E's x-rays, has concluded that because of the early arthritic changes in the worker's back, limping per se would not aggravate the back condition.

Now, I would like to turn just very briefly to Dr. B's statement. Dr. B is the worker's family physician. He basically indicates that Mr. E has degenerative disc disease which symptoms exacerbated and secondary to the right knee problem.

I am uncertain exactly as to the information upon which this conclusion is based. It may be the same sort of information that was provided to Dr. A, but nonetheless there does not appear to be very much elaboration in this medical report, and I think we have to treat its weight very cautiously.

As a lay person, I find the opinions advanced by Drs. A and B to be curious. If the conclusion are right, then Mr. E would have been expected to suffer back pain in November, 1980 - that is the date of the knee injury - and in the period when he was on crutches. Yet all the evidence on file indicates that the worker was not suffering any back problems during these time periods. Therefore, the theories of medical causation advanced by Dr. A in particular, again from a common sense perspective, seem questionable.

Madam Chairman: Mr. Bell?

Mr. Bell: The Ombudsman has invited a question to be put to the Board. That is: How can you reject two medical opinions and prefer another conclusion, given the brevity of the one medical opinion that you have, and I guess further underscored by your comments made recently that this would not be an acceptable opinion today.

How can you reject two medical opinions expressed as they are and base your opinion on something else?

Mr. Glasberg: Well, I think first of all that the key medical opinion, Dr. A, it has been my submission that it proceeds from an erroneous factual base, and its conclusions do not really jibe with the file itself and are kind of inconsistent in the sense that the worker never complained of this problem.

I think that - and I have said this on a number of occasions before this Committee - that the adjudication of a claim involves consideration of a variety of factors. One of the factors obviously is medical opinions. But, in a variety of cases, the medical advice will not be the weighty factor.

In this case, unlike some of the others that have come before the Committee, there is a very powerful competing theory of causation. That is, the individual on two separate occasions in the past has suffered from relatively serious bouts of degenerative disc disease, and I would infer that the Appeal Board concluded that if this happened

twice, it likely happened a third time and that the Appeal Board was not persuaded by the medical theories of causation propounded by the two physicians which seem to some extent to be based on speculation.

We have heard from one member of this Committee that the proposition that walking on crutches might add strain to the back seems counter-intuitive because when you are walking on crutches, you tend to put pressure on your arms, which reduces the strain on the back. And in my view the Committee had in mind other than medical factors and concluded that a reasonable decision could be made on this case.

Madam Chairman: Any questions from the committee?

Mr. Philip: I am just getting some experience from someone who has used crutches, since I have not used crutches.

Madam Chairman: I see. I did not see any -- I just wanted to give you ample opportunity to pose a question if indeed you wanted to do so.

I have just one or two. In terms of this doctor's opinion from the Board's doctor -- is that Dr. C?

Mr. Glasberg: Yes, that is right.

Madam Chairman: The question I think all of us have in a medical opinion coming down as "No" with no reasons, you are saying this would not be acceptable now? So that there are new regulations or new policy in place to permit longer discourse in a letter as to a medical opinion?

Mr. Glasberg: Well, we believe that it is very important for physicians to fully explain the basis for their decision, and, quite frankly, a very terse statement like that would not be acceptable.

I think that the issue has to be put in some perspective. Board physicians deal with a tremendous volume of cases. I mean, you have 400,000 lost-time injuries a year that are filed with the Board, and with this tremendous volume, it is at times difficult for Board physicians to be as elaborate as we would like.

So I am not going to tell you that in every case you are going to get well researched, elaborate opinions but it would be my expectations that you will get on a piece of paper material which will allow you to understand how the physician arrived at his or her conclusion, and if further elaboration is required, that will be provided.

Madam Chairman: Yes. I guess my concern in this way -

and I am glad that this problem has been rectified - but this Dr. C did not see the complainant, Mr. E, at any time, did he?

Mr. Glasberg: That is correct.

Madam Chairman: So that what he was basing his decision on is the file which Dr. A would have compiled, and he looked at it and he went, "No."

Mr. Glasberg: This is actually an issue that has undergone a fair amount of discussion within the Board. The issue is really: Should a Board physician be required to examine an injured worker before rendering an opinion?

And I believe it is felt that in some situations this would be very appropriate, that the examination should take place, but it may be that there exists sufficient material on file which would allow the physician to make a determination without having to examine the worker.

For example, as we have seen with the follow-up opinion on page 38 of your materials, the other Board physician was able to have a look at the x-rays of this individual and form an opinion on the extent of degenerative disc disease without actually having to examine the individual. The bottom line is it really does depend on the facts of the case.

Madam Chairman: And my final question then is the Board's case then is not necessarily they believe that Mr. E had a back problem or a back problem that would have disabled him, but the position is that if it was induced or related to the crutches which were a result of the knee problem, that it would have been evident sooner than it was evident, which was two to two and-a-half months after the crutches were stopped - the use of crutches was stopped - then the back problem was complained of to a disabling nature. Is that your point? One of your two points?

Mr. Glasberg: In fairness it might not be two or two and-a-half months. There is some discussion as to how long the individual was on crutches, but it seems there was a fairly lengthy period of time.

I guess the upshot of all this is that the Board does not believe that the theory that crutches, the use of crutches in physiotherapy, precipitated the back problem is a plausible -- well, it may be plausible but it is not the best theory available. Based on the fact that the individual had suffered back problems on two separate occasions in the past which were not work related, we feel that the latest onset is the result of that degenerative disc condition.

Madam Chairman: Mr. Bossy?

Mr. Bossy: Yes. I would like to ask a question on whether the Board's decision was influenced by a coincidence.

And I find that there is definitely a coincidence. You mentioned earlier a point that there was a plant layoff and that all at once this back pain took over at the time of the layoff. Would the Board have been influenced anyway in their decision to assume that all at once here we have a back pain now, the man has been laid off?

Mr. Glasberg: I would say that that was not an important factor, if a factor at all, in the Board's decision. I think we could say it was coincidental, and I am certainly not making a proposition here that it was the fact that the plant was going on layoff that prompted the injured worker to file a back claim. That is not the Board's position.

Mr. Bossy: Thank you. And just one little point that has not been brought up. During the entire incident as far as the knee, did Mr. E at any time have a cast on his leg?

Ms. Morrison: Yes. Our understanding is that he had a cast after surgery.

Mr. Bossy: He had a cast after surgery thereby to mobile him with the crutches. That would be the reason?

Ms. Morrison: That is right.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Yes. Just a clarification. You said, I think, that the Board made the decision without very much medical knowledge?

Mr. Glasberg: That is right.

Mr. Johnson: And a lot of it was based on the way the case was presented. And I think, if I understand it correctly, that Mr. E made very few complaints about the pain that he was suffering?

Mr. Glasberg: Our argument is that after the surgery on March 12th until he returned to work, there were no complaints of any back problem documented anywhere in the file.

Mr. Johnson: I can understand that, and the only concern I would have is that there are individuals who complain about everything and there are other individuals who complain about very little. And I would hope that the

Board would not make a determination based on the degree that people complain. Or if they do, then I would suggest that we tell everyone that has a problem with the Board to complain from day one.

Mr. Glasberg: I think that is a very legitimate point you are making, but you would think though that where an individual was seeing his orthopaedic physician, really the expert in the area, and did have a problem, you would expect during the course of the visit for the individual to say something whether or not he is the stoic type.

It is just, as you, I suppose, in the Board review lots and lots of files, you see this as a trend, that people who do have problems will have a tendency to report them when they do see a physician.

Mr. Johnson: I understand that, but I have a great deal of difficulty understanding how Dr. A and B you do not give too much credit to them and Dr. C, that should have gone a little further I think, has left you in a position of making a decision without too much advice from the medical profession.

Mr. Glasberg: I can understand your view. I should just maybe repeat that it is the adjudicator rather than the physician who does make these decisions. Medical advice is one factor to take into account. In some cases it will be extremely important; for example, when you have a complicated industrial disease claim.

But in other cases, the importance of medical opinion may be less than other factors on file, and I would suspect that this is the sort of case that falls in the latter category. You have to look at things from a common-sense perspective and figure out what theory makes the most amount of sense.

Madam Chairman: Mr. Philip?

Mr. Philip: Is there any examination --

Mr. Charlton: May I just have a supplementary on this issue that is being dealt with?

Mr. Philip: Sure.

Madam Chairman: Mr. Charlton?

Mr. Charlton: You are correct that it is the adjudicator that makes the decision, not Dr. C. On the other hand, if Dr. C had made a three-letter word response instead of a two-letter word response, is it not likely the adjudicator's decision would have been different?

Mr. Glasberg: What do you mean by a --

Mr. Charlton: If Dr. C had said, "Yes," y-e-s, instead of "No", n-o, to the adjudicator's question, would the adjudicator's decision not likely have been different than it was?

Mr. Lupusella: Depends on what question it is.

Madam Chairman: Hypothetical, I believe.

Mr. Glasberg: You have a tendency to ask very intriguing questions.

Mr. Charlton: I am just trying to establish the reason why the adjudicator asked the question in the first place, to help him make his decision.

Mr. Glasberg: Well, I suppose if I was adjudicating this case and I got a "Yes" back, I still might have some concerns about whether the claim should be allowed, and I would ask for elaboration because "No" is as problematic as "Yes" for me, personally.

Mr. Charlton: But the adjudicator did not ask for elaboration in any case at that stage.

Mr. Glasberg: No. There is a problem at the Board in terms of adjudicative staff asking physicians the right question. It seems to be very imprecise. Individuals will improperly ask physicians at times questions like: Should this individual receive compensation? That is not a medical question; that is an adjudicative question.

You should be asking: What is the likelihood that event A caused condition B? That often does not happen, which causes medical opinions to come back often answering the question that really ought not to have been answered and failing to answer the question that should have been answered.

Mr. Charlton: And the point is though that the adjudicator asked a medical question in this case and asked the medical question because he was seeking advice on a medical theory which had been put to him by the other two doctors. And he did not seek any elaboration of the one-word answer and therefore has likely accepted that one-word answer and it has influenced his decision. Is that not correct?

Mr. Glasberg: It is really hard to put yourself in the minds of the Appeal Board, but I would have hoped that this decision was rendered because it was felt that there was a better theory of causation.

Madam Chairman: Mr. Philip?

Mr. Philip: On at least one of the theories of causation, namely Dr. A's, part of it is related to physiotherapy. Can anybody tell me are there any indications on the file of the physiotherapist, or at any time was the physiotherapist contacted to find out whether or not Mr. E complained that while under treatment in physiotherapy that the treatment was in some way affecting his back?

Mr. Glasberg: I gather that the physiotherapists employed by the worker's company did make some reports to the employer, and if you will just give me a moment I will see if I can lay my hands on it.

The report of the Board's investigator dated September 29th, 1981, simply indicates the dates in June and July, 1981, when the injured worker attended for physiotherapy. Unless I am mistaken, there are no specific reports from physiotherapists appearing on the file.

Mr. Philip: I guess my concern would be that if we are questioning Dr. C's medical diagnosis that it was related to crutch-walking rather than physiotherapy --

Mr. Glasberg: Dr. A's.

Mr. Philip: -- Dr. A's, I should say -- Dr. A's medical opinion, then a logical step by the Board would have been to contact the physiotherapist and ask whether or not there were any records of complaints. And that does not happen to have been done.

Mr. Glasberg: If you will just give me a moment.

Mr. Glasberg: There is not anything specific on file other than a statement in the decision of the Appeals adjudicator indicating that the injured worker confirmed that he was symptom-free while on crutches, believing that these caused an even distribution of his weight and that he remained symptom-free until his return to work on June 15, 1981. That is one point.

I guess the second is, although I may be mistaken on this, where a physiotherapist encounters a problem with an injured worker, one would likely expect that to be made known to the referring physician. I am not certain if that is correct, but --

Mr. Charlton: The physician from whom the theory about physiotherapy came?

Mr. Glasberg: I think that is reasonable and we have nothing on file to indicate that any information of that

nature was transmitted. And one probably would have expected that in Dr. A's report. Had there been a problem with the physio, you would expect to find that in the report.

Madam Chairman: Dr. Henderson?

Mr. Philip: I guess I would have expected to find in the report some opinion sought from a physiotherapist, most likely the physiotherapist who had been involved in the particular exercise, or at least some physiotherapist, than to give an opinion as to whether or not this type of exercise could exacerbate the back problem. And we do not have that on file.

It would make it an awful lot easier in making a decision on this case if we, in fact, knew whether or not this type of exercise or physiotherapy to this type of knee ailment in fact has the potential of creating this type of back problem. And one would think that the person most knowledgeable in providing that kind of answer would have been a physiotherapist if not the physiotherapist.

Mr. Glasberg: Just to respond to that question, I believe that the Board relied on the worker's statement that he was not experiencing any discomfort during that period of time, and as a result, did not feel it necessary to obtain information from the physiotherapist. I would also indicate that that was certainly an avenue available to the Ombudsman's office as a way of adding sort of further weight to their concern, but that avenue was not pursued.

Madam Chairman: Dr. Henderson?

Mr. Henderson: I have a question I would like to clarify, and I perhaps should know the answer to this already, and I apologise if that is the case and maybe I should ask Mr. Bell's view of this also.

The decision about entitlement, does that require only that there be a possibility or a plausibility, or is it really necessary to determine that the injury indeed or the treatment of it or the sequela or something caused the disability for which claim is being sought? In other words, how close is the causal length here?

Mr. Bell: I think it is generally agreed that the burden of proof in an appeal to the Board at the material times of this complaint first of all, that burden is on the injured worker whose benefits have been denied, and it has been said in general terms that it is the civil balance of probabilities that you have to establish on evidence on a balance of probabilities that the cause A brought on the symptoms B.

I think, with respect, that is not an accurate description of the burden. I think you have to look at section -- We looked at it with some of the other cases. Section 3? Section 3(4), which is the so-called reasonable doubt section.

I think it is a balance of probabilities, yes, but qualified by the reasonable doubt. And I know there are different views, some of which are in this room, perhaps even between Mr. Glasberg and myself, as to what the relative impact of the doctrine of reasonable doubt is. I think, he can speak for himself. Mr. Glasberg thinks that it probably should be used probably more frequently than I do, and I guess it depends on what you view it be the underlying philosophy of the exercise.

Boiling that down, Dr. Henderson, --

Mr. Henderson: Please.

Mr. Bell: -- where you have got evidence that is capable of two interpretations, one or two conclusions each of which is in relative terms as good or as strong as the other, the tie goes to the injured worker.

Now, another way of saying that is where you have got body of evidence A in favour of entitlement, and where you have got body of evidence B in favour of no entitlement and those bodies of evidence are approximately equal in weight, you accept A, the injured worker's. In other words, the tie goes to the runner, and the runner in this case is the injured work.

Now that is an over simplification. Applying that to this case, you have got to either identify whether the totality of the evidence is capable of two interpretations, each of which may be equal, or whether there are two bodies of evidence and what their respective weight may be before deciding whether -- at least at the Appeal Board level -- whether the onus had been satisfied.

Madam Chairman: Mr. Glasberg, would you agree with the synopsis in general in Section 3(4) and how it applies?

Mr. Glasberg: I would agree generally. Perhaps I would make a couple of points.

First, since the Workers' Compensation system is not adversarial in nature, the onus would not strictly fall on the injured worker to prove a good case but the injured worker and the Board collectively would have to obtain evidence to suggest that the claim should be allowed.

My interpretation of the benefit of doubt provision is that where evidence is more or less evenly balanced for or

against a worker, that the benefit of doubt should be extended to the injured work and that individual will receive compensation.

I suppose in most cases, there will be a preponderance of evidence one way or the other, and I think it is certainly the minority of cases where the benefit of doubt provision applies.

I should also indicate I do not see the benefit of doubt provision as being a substitute for putting a viable theory of causation on the table.

Mr. Henderson: I would like to say, if I may, Madam Chairman, why I think it is important in this case. Because I do not read the opinions of Dr. A and Dr. B as being very firm. I read them as being -- Dr. B says, 'Well, it is reasonable to accept --' and so on. He is talking about, as I would hear it, that it is plausible that this could have occurred but he is not saying, in my opinion, that is what happened.

Mr. Charlton: They are always like that. Read through the rest of the cases we have got here. They are all like that.

Mr. Henderson: Well, let me finish my point. And Dr. A says, "I would suspect that making a claim on the basis of aggravation may very well be justified." So he is not saying, 'I think it happened' either.

Dr. C is saying I think it did not happen. And I have not -- You know, if there were some medical opinions that said it happened, I would find that more persuasive.

And I am not sure that I quite agree with Mr. Charlton because, as I recall when I used to do and be involved a bit in these kinds of opinions as a physician, when I would use that kind of language would be when I was sort of unsure but wanting to give the benefit of the doubt to the patient or the worker, but I am not that sure as to how it really was. I hear it as pretty soft language.

Madam Chairman: Unless you want to respond to that, Mr. Glasberg, Mr. Elliot is the next. I do not think there was a question there.

Mr. Glasberg: Just one very brief point. First of all, the benefit of doubt is a principle that is to be applied by the claims adjudicator after amassing and evaluating all the evidence.

It is not a concept to be applied by physicians or anyone else in the system. They are to give their best opinion and then the adjudicator decides, based on all the

evidence.

Madam Chairman: Mr. Elliot?

Mr. Elliot: I would like some clarification, and I am looking at page 21 of the handout we were given. Putting this all together, apparently this individual went back to work on June the 15th and this was in the middle of the last 19-- physiotherapy treatments as the dates are recorded in item 9 on page 21?

Mr. Glasberg: That is right.

Mr. Elliot: And it is very clearly stated in item 9 as well that if, as claimed, the period on crutches subsequent to his knee injury aggravated his low back condition, why is there no evidence of this complaint, which pertains to the question I want some clarification on because that kind of factual information, if it is absolutely correct and not refutable, compared to the kind of thing that is written by Dr. A dated July the 27th, 1982, which is a year after the fact, on the request of the worker, seems to me to be rather irrefutable kinds of evidence that there was not any aggravated back condition because of the crutches specifically.

Mr. Glasberg: I would agree with that evaluation. I think that in cases such as these which are admittedly close that you have to look beyond the medical evidence to, I guess, a common-sense approach to adjudication. And if the theory on the table is that the use of crutches precipitated the complaints, you would have expected problems in the relevant time period and that the injured worker would have complained. That just did not happen here.

Mr. Elliot: That is coupled with the information in item 10 as well where on two separate occasions on July the 3rd of '81 and July the 22nd of '81, which is relatively close to the layoff date of July the 31st, '81, there was no disclaimer made concerning the back, and this was actually at the medical department of the Board?

Mr. Glasberg: No; this was the worker's employer -- company.

Mr. Elliot: The worker's employer, okay.

Madam Chairman: Could I ask you to sum up, Mr. Glasberg, if you have any --

Mr. Glasberg: I am not sure that the Ombudsman's office has had the opportunity to sum up.

Madam Chairman: Well, I was going to give you your opportunity and then go there, if that is...

Mr. Glasberg: Oh, fine.

As I have indicated, there are two possible theories of causation to account for the onset of Mr. E's back pain in June and July, 1981. First, it is acknowledged that the worker had suffered recurring problems with his back due to a degenerative disc condition. Such episodes had occurred in 1975 and late 1980. In one case the injured worker had received physiotherapy for a period of three and-a-half months.

Given that Mr E's back had flared up on two separate occasions in the past, the Board believes that on a balance of probabilities this incident was also attributable to the pre-existing degenerative disc condition. This is not a theory based on speculation or conjecture but rather one based on clear historical facts.

What are the theories being advanced on the other side? There are essentially two. First, that the use of crutches aggravated the pre-existing back condition. It is argued in this respect that by employing crutches, there was a weight shift which produced back pain.

The critical flaw with this argument though is that the worker was off crutches for a significant period of time before he is said to have experienced back pain. Surely for this theory to be credible, there would need to be reports on file to suggest that the worker was experiencing pain or discomfort in this period. These written reports are entirely absent.

It will be noted that this theory of causation was originally put forward by Dr. A. Since, however, Dr. A's opinion appears to have been founded on an incorrect understanding of the facts, it must be discounted if not ignored all together.

The second theory of causation is similar. This theory suggests that the limp which Mr. E is alleged to have developed, might have placed additional pressures on certain areas of the back, thus causing pain and disablement.

There are also a number of serious difficulties with this theory. First, the file does not indicate that Mr. E had any problem with limping when he came off the crutches.

Second, any problem which might theoretically have existed would have disappeared before the individual returned to work.

Third, after a review of the relevant x-rays, Dr. C has concluded that a limp would not be -- I am sorry, it is not Dr. C; it is the Board physician who subsequently rendered

an opinion on this case.

Mr. Bell: 'Dr. No.'

Mr. Glasberg: No. 'Dr. No' is Dr. C.

Madam Chairman: Dr. D.

Mr. Glasberg: This is the doctor whose opinion appears on page 38 of the documentation. This doctor concluded that a limp would not be expected to exacerbate Mr. E's degenerative disc condition. This physician makes the same comment vis-a-vis the use of crutches.

I wanted to remind the committee again of Section 3(1) of the Workers' Compensation Act. This provision specifies that for an injury to be compensable, it must arise out of and in the course of employment. Where it cannot be shown on a balance of probabilities that an injury is work-related, the law does not permit compensation to be granted.

The one exception would be under Section 3(4) of the Act where the evidence is balanced for or against and the benefit of doubt would be applied.

In the Board's view the facts of the case do not support the proposition that the exacerbation of Mr. E's back condition was work-related. Rather, the more logical and plausible theory is that the onset of back pain in the summer of 1981 was caused by the worker's episodic and recurring disc problems.

Finally, I want to remind you that a test specified in Section 22(1) of the Ombudsman's Act to determine whether a decision of an administrative tribunal should be rescinded is whether that decision was reasonable.

In the view of the Board and based on today's discussion, it is clear that the Appeal Board's decision was reasonable and I would submit correct.

Thank you.

Madam Chairman: Any questions at this point before the Ombudsman's Office sums up? Good.

Could you proceed, Ms. Morrison?

Ms. Morrison: Yes. A couple of small points that come out of the discussion that you have had with Mr. Glasberg.

The first is just to clarify the December back problem. The December back problem was not compensable because it was not disabling. There was no attempt to make a claim for

compensation because there was no disability.

Had that back problem been related by the doctor to the knee injury a few weeks earlier, it would have been compensable as a sequela of an injury arising in the course of employment.

Secondly, the Board's investigator himself has noted that the complainant had back pain up until the time he was on crutches. I will quote from the Board's investigator's report in which he says:

"Continuity of symptoms: The workman states that he then had constant pain in the left side of the back which was a dull pain and sometimes would be sharp in nature, and he could be doing anything at any time and it would occur even when sitting down. He would take 282s to relieve the pain and states that he was able to cope with the problem until the time that he went off for a knee operation in March of 1981. The workman states that he was then on crutches from the knee operation and was symptom-free until he returned to duties on June 15th, 1981."

As I said before although the Board's investigator states that there were no symptoms during that time, the complainant himself has stated that there were symptoms.

I think in trying to --

Mr. Bell: To whom?

Ms. Morrison: Sorry. To us.

Mr. Bell: When?

Ms. Morrison: To our investigator, during telephone conversations during our investigation.

Madam Chairman: And your investigation would have been two to three years after --

Ms. Morrison: That is right.

Madam Chairman: -- five years after this event?

Ms. Morrison: That is right.

Mr. Bell: Is there any evidence that your investigator determined as a result of your investigation that shows that the individual reported or complained of those symptoms at the time they were experienced or he says they were experienced?

Ms. Morrison: During June of 1981?

Mr. Bell: May, June.

Ms. Morrison: Yes. June 23rd, 1981, even the Board's investigator suggests that he has gone to the doctor because of recurrent left loin pain, and he was seen for recurrent pain again in July, 1985. The doctor, Dr. A, has related the pain that he had in his back in June to the cumulative effect of using crutches and physiotherapy.

Mr. Bell: Just while we are on that - and I am not going to use the word "theory" - the Ombudsman's conclusion as a result of this investigation is (a) that this man has sustained exacerbation of a pre-existing condition brought on by crutches and physiotherapy?

Ms. Morrison: I think to state our position exactly, we would say that we believe that the back disability suffered in the summer of 1981 was related to the knee injury both through the use of crutches and physiotherapy as suggested by Dr. A, and perhaps due to the injury itself.

I think what we are saying is the doctor has suggested that the cumulative effect of the injury, the crutch-walking and the physiotherapy were causal factors in the disability.

Now, everyone has said his opinion is not strong, is tentative. I think I spoke a few days ago to this same committee about the problem with medical evidence and getting strong medical reports from doctors who are not with the Board. Of course, the Board's doctor's response was very strong. "No" is a very strong response, but it is not a reasoned response.

We have a worker here who was denied compensation, although when he goes to the Appeal Board he has two doctors reports that clearly at least support some connection between his back problems and his knee problems and one Board doctor who says simply "No."

I think the other thing that we would like to say maybe follows a little bit on what Mr. Philip was asking earlier about the 19(3) response. If the Board is really convinced now, here, talking to you, that this medical report of Dr. A's is not a good report, is not logical, does not support the theory of causation, they were at liberty at that time to get a better report. In fact, at the 22(3) stage they asked the very same doctor - and we should be very clear about that - the doctor who gives the report that you see on the x-rays at the very end of your material is the very same doctor that said, "No."

Mr. Bell: I thought so. That is 'Dr. No.'.

Ms. Morrison: That is right. They went back to the

very doctor who had said "No" and asked him for a further opinion.

They had all kinds of other possibilities. They could go have gone (a) to another doctor and asked another opinion, which might have been a little bit more persuasive since he would not have had a vested interest in supporting the "No" statement.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Did that doctor who gave the opinion in '87 the same doctor, Dr. C, or not?

Ms. Morrison: Yes, it was.

Mr. Glasberg: It was. Just let me clarify that point.

Madam Chairman: There for a moment I thought we had a Dr. D.

Mr. Glasberg: I am sorry. I had been mistaken. All the names are whited out here. It was, in fact, the same physician.

Ms. Morrison: To complete, as the day is late, I believe that this worker had good medical evidence in his appeal which supported the causal connection between his disability in the summer of 1981 and his injured knee. There was never any question, and I should repeat this because of the comments that have been made about the fact that a strike occurred during the summer or there was no employment during the summer.

There has never been any suggestion that this was anything less than a genuine back disability. The doctors, in fact, stated that he was totally disabled so there is not a question that he just thought up a back problem at this time in the summer.

Madam Chairman: Mr. Charlton?

Mr. Charlton: Yes. I wanted to go back for a moment to a comment you made about seeing physicians in June about back pain and even a reference to that in the investigator's report.

Ms. Morrison: Yes.

Mr. Charlton: And how do we square that then with the Appeal Board decision - I lost myself here now - where, in fact, the Appeal Board states the opinion that there was no further mention of back problem until July the 31st. Surely the Appeal Board had access to the investigator's report and indications that there were, in fact, problems prior to that

as stated in the investigator's report?

Ms. Morrison: The investigator's report is dated October 1st, 1981, and notes that on June 23rd, 1981, he had recurrent left loin pain, to do exercises, to be referred to Dr. A

Interjection: Recurring left what?

Ms. Morrison: Loin pain -- whatever that means.

Mr. Bell: Well, it does not --

Ms. Morrison: To do exercises.

Mr. Bell: Is the loin part of the back?

Ms. Morrison: They then took those back x-rays as a result of that visit, so that is my understanding.

Mr. Bell: Okay, yes.

Ms. Morrison: I think that is correct.

Madam Chairman: Any further concluding remarks, Ms. Morrison? None? Any further questions by the Committee?

Mr. Philip?

Mr. Philip: I guess one to Ms. Morrison, and that is would you give me once again then your summary as to -- or your arguments against item number 9, page 21.

Ms. Morrison: Item number?

Mr. Philip: Well, the employer's report. It is inaccurate. Even according to the Board's investigator, he states -- okay, we have the dates of physiotherapy and in the Board's investigator's report he says that on June 23rd, 1981, which is one of those dates, he had recurrent left loin pain, to do exercises, and to be referred to Dr. A

Now, he must have complained or that would not be there. And he says then at no time during the aforementioned physiotherapy treatments and post-operative examinations is mention made of that discomfort exacerbated by the right knee problem. Just remember that this response is a response from the employer.

Mr. Philip: I recognize where it is coming from, but I just -- The theme then running through the Board's response is that there was no complaint during the physiotherapy or the time of using the crutches concerning back pain.

Now, you are saying that the reports do show that at

least on one occasion there was a complaint?

Ms. Morrison: There was a complaint according to the Board's own investigator. The complainant also told us that he complained to co-workers. No co-workers were interviewed by the Board's investigators so we have no information about whether he complained to co-workers or not.

Mr. Philip: And you did not attempt to interview them either?

Ms. Morrison: We did subsequent to the 22(3) report but it was not information we had prior to that report so we did not introduce it today.

Mr. Philip: Okay.

Madam Chairman: Mr. Glasberg?

Mr. Glasberg: May I just respond to those points very briefly.

In mid-June, the worker was off crutches so I do not believe that that in any way strains the theory that the Board is putting forward. Now, statements were taken regarding two supervisors of the injured worker, and my understanding is that in both cases the complaints were not substantiated and I have copies of those reports, if you would like to see them.

Mr. Philip: Is that part of the record?

Ms. Morrison: Yes. They were not co-workers.

Mr. Philip: No, the supervisors, the statements by the supervisors. Is that in the record here? Can you reference it?

Ms. Morrison: It is part of the WCB investigation.

Madam Chairman: We do not have a copy of that.

Mr. Philip: We do not have a copy of that.

Ms. Morrison: The complainant asked the WCB investigator to interview co-workers and those co-workers were not interviewed.

Mr. Philip: So the supervisors were interviewed and that is part of the WCB's record, but the follow-up that you did with the co-workers is not in the record or in the material because it is post-22(3).

Ms. Morrison: He initially did not want us, many years after the fact, going back and talking to his co-workers.

Until the 22(3) report and the response that we got in memo no. 51 and the Board's view that the medical opinions were not sufficient to support the complaint and that there was not continuity of complaint, we then went back and asked the co-workers, but we did not bring that information forward for the reason that we had not had an opportunity to supply it to the Board before late last week. I can supply that if you want it.

Madam Chairman: Thank you. We have now determined that sometime between June 23rd and onward the complainant, Mr. E, started experiencing back problems which ultimately on July 31st ended up being a disability.

Now, I do not want to call on you for a medical opinion, but this would be anywhere from three to five week after he stopped using crutches because we are not sure really whether he stopped using crutches mid-May or the end of May. So it is anywhere from three to five weeks after this. So the Ombudsman's office, as a result of the doctor's opinion, thought this was a reasonable length of time afterwards for the symptoms to have occurred and to have related it to the crutch theory.

Ms. Morrison: Given the fact that the orthopaedist related the back problem to the crutch-walking and physiotherapy and the physiotherapy was still going on at this time -- he was off crutches but he was having physiotherapy. In fact, he had physiotherapy up until July 21st. So all of this time he was in physiotherapy.

Given the fact that the orthopaedic opinion, which was a reasonably-argued opinion, related the back disability to the crutch-walking and the physiotherapy, yes, the Ombudsman's opinion was that on the balance of evidence before the Board, the back problem was related to the knee injury. The only evidence on the other side was a "No," and there were two doctors who were prepared to put in writing their view that there was a relationship between the back problem and the knee injury.

Madam Chairman: Mr. Charlton?

Mr. Charlton: Just one question that I have. It, I guess, relates to the nature of this period in the summer and fall of 1981 as compared to the other two incidents that are referred to of back problems.

It is my understanding from the reading of this - and this is what I will basically want to ask - is that in neither of the other cases were the back problems disabling, that in '75, '76 case there was physiotherapy involved but no time lost from work?

Ms. Morrison: That is correct.

Mr. Charlton: And in the fall of 1980 situation, shortly after the accident, there was back discomfort but no disabling nature to the injury?

Ms. Morrison: That is correct.

Mr. Charlton: And that what we are trying to identify here is the cause of the first disabling incident of this back problem; is that correct?

Ms. Morrison: That is correct.

Madam Chairman: Any final questions? None? Then, we would ask if you could kindly leave the room, and we hope that we can get back to you in a reasonable length of time.

Please keep yourselves available.

---Recess taken at 4:45 p.m.

---On resuming at 5:07

Madam Chairman: Thank you very much for waiting, and the day is coming at an end so we appreciate your waiting so patiently. I am glad I do not have to go out in the hall and see you all pacing.

In the case of Mr. E, the Committee has decided by a motion not to support the recommendation of the Ombudsman. The committee will be reporting this decision with reasons to the House in its next report.

We thank very much for coming, the Board and the Ombudsman on these particular four cases that we have had before us, and, well, we hope we do not see you again, but we thank you very much for your contribution.

Mr. Bell?

Mr. Bell: May I just say just since this is the end of the Board's attendance, may I just give you a comment then.

First of all, Mr. Glasberg, having regard to the relative inexperience with Committee matters, he is to be commended for the, I think, quality of the submissions.

I repeat something I said earlier last week that the quality of the dialogue, if you will, between the Ombudsman's office and the Board and the Committee is extremely high.

Again, I echo the Chairman's remarks that we hope not to see you again. That is a fond hope that has never been

fulfilled in the past.

I think just gratuitously, Mr. Glasberg, and through you to your colleagues, if the quality of the submissions and the detail of same were to form part the Ombudsman process before it gets to the Committee, I think, one, there may be fewer cases but I know, secondly, that the Committee would be able to deal with them even better than they did the last week, and I consider the committee's treatment of this to be quite extraordinary in the circumstances.

So a gratuitous message from somebody who may or may not have any right to say so.

Mr. Glasberg: Much appreciated.

Madam Chairman: Thank you very much. And just for committee's notice, we have the Agriculture and Food tomorrow morning, which is Tab A.

And do we have anything in the afternoon? The Ministry of Natural Resources, which is a special report in the afternoon. Okay?

We will see you tomorrow at 10 o'clock. Thank you very much.

---The committee adjourned at 5:10 p.m..

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

TUESDAY, JANUARY 26, 1988

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Johnson, Jack (Wellington PC) for Mr. Pollock
Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman
Morrison, Gail, Director, Investigations
Lee, Dr. Allan, Investigator

From the Ministry of Agriculture and Food:

Dombek, Carl F., Director, Legal Services

From the Farm Products Marketing Commission:

Knox, Ken, Chairman
Alles, David, Vice-Chairman

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, January 26, 1988

The committee met at 10:10 in committee room 2.

Madam Chairman: We would like to commence this morning, if we may.

We are hearing today the case of Mr. and Mrs. J, Ms. N, Mr. and Mrs. O, Mr. P, and the Ministry of Agriculture and Food.

I understand that it is the Ministry of Agriculture and Food's first hearing before the Standing Committee on the Ombudsman, and we welcome you. We hope we encourage you never to come back again.

We have something that is being handed out to each member from the Ombudsman, so if you can ensure that you have it before you. We will just wait for it to get a little bit further around.

Dr. Hill, would you like to open with a few remarks?

Dr. Hill: Thank you, Madam Chairperson.

The fund for Milk and Cream Producers was established in May 1967 to protect the producers of milk and cream against any loss due to default on payment by a producer.

The complainants, who were goat's milk producers, submitted claims to the Fund on different dates during the period September to October 1982, for unpaid milk delivered to the processor during the period June to September 1982.

The processor, which was the only processor of goat's milk in the vicinity, collapsed financially in September of 1982.

The Fund rejected all four claims because it believed that the claims were filed too late, that there was an arrangement among two of the producers and the processor whereby the processor was given additional time in which to pay these producers which was in violation of the regulations, and because the claims could not be properly substantiated based on the records of the Fund and the producers.

Following our investigation it was my conclusion that the Fund's decision not to pay the claims of the complainants was unreasonable, and I recommended that the Fund should pay the first 60-day period on each of the

claims arising from the financial collapse of the processor.

Our rationale was that although some of the claims may have been technically late, there is discretion given to the Fund under the Regulations to pay, even when the claims are late, so as long as the claims are made in substantial conformity with the regulations.

In addition, I do not feel that the Ministry have provided me with sufficient information to show that there was an arrangement between the processors and the producers, and further I felt that they were sufficient records to substantiate the producers' claims.

I should note that a meeting was held on August 31st, 1987, among my staff members and officials from the Ministry of Agriculture to discuss this case. As a result of that the meeting Gail Morrison, my Director of Investigations, wrote to Dr. George Collin on September 14th, 1987, setting out a number of points and indicating that unless we had better evidence from the Ministry on these points, the Ombudsman would continue to support this complaint. We did not receive a response to this letter until January the 19, 1988, last week.

Although we were prepared to respond to this information as well as possible, given its late submission, I feel I should comment on the delay and its effect upon our presentation.

Thank you, Madam Chairperson. Gail Morrison, the Director of Investigations, will handle the case for for the office.

Madam Chairman: Thank you very much, Dr. Hill.

Yes, Mr. Philip?

Mr. Philip: As you are aware, Madam Chairman, members of the Committee take a dim view of the failure to respond to the Ombudsman's 19(3) letter.

Can Ms. Morrison tell us whether there was an ongoing dialogue or negotiations during this period in which there was no response to a letter from the Ombudsman?

Ms. Morrison: Mr. Philip, we had had an ongoing dialogue up until the meeting in August. Following the meeting in August we did not hear again, but we expected a response to our letter. I spoke a number of times to Mr. Dombek, and finally as we were coming close to the Committee hearings we began to get concerned that we were not going to have a response.

I was promised one, as you will see from the memorandum

on page 70, December 10th in a telephone conversation, and the eventual response arrived on January 19th.

Mr. Philip: Was there any reason given to you for the delay in the response?

Ms. Morrison: No. They said they were preparing a response. There was, I think, in one phone call a suggestion that the correspondence which had been prepared was not satisfactory and had to go back for review.

Mr. Philip: Has the Ombudsman received similar complaints from people other than goat's milk producers; in other words, dairy producers, of their being disqualified because of late submissions?

Ms. Morrison: These are the only complaints we have against this particular Fund. There were others who had also sold goat's milk to this processor, they are not complainants of ours.

Mr. Philip: Then this producer would also deal not just with goat's milk, but also with all other sources of milk as well?

Ms. Morrison: This was a processor of goat's milk.

Mr. Philip: Exclusively?

Ms. Morrison: Yes.

Mr. Philip: Okay. Thank you.

Madam Chairman: Mr. Bell?

Mr. Bell: Ms. Morrison, before we start into the detail, I am sure you realize that by now, I have, and I know Members of the Committee, the process of anonymizing is not complete in this case. There are some names of individuals and corporations disclosed. My suggestion is that after this morning we sanitize the records, so to speak, and if your office would provide the Committee Members with totally anonymized copies.

Members of the Committee, just a note of caution, as you are going through the material, where you see a name just do not mention the name, whether or not it is appropriate to be disclosed.

And again for Hansard, to the extent that there is anything disclosed this morning, the names should be deleted.

Ms. Morrison: Thank you, Mr. Bell. I apologize for that fact that inadvertantly some of the names were not

removed from the documents.

I also would like to apologize for not having introduced my colleague yesterday, Mr. Arkell, who was assisting me.

This morning I have Dr. Allan Lee, who was the investigator on this file, who will assist me in my presentation.

Mr. Bell: As you do so, just a comment, I think the Committee would benefit more from a review of the report than a synopsis, speaking for myself. I do not think the synopsis, particularly in a factual sense, is that helpful to get a full understanding. So if you would give more emphasis to the report.

Secondly, I know members of the Ministry intend to speak to this as well, but I would appreciate, from the Ombudsman's perspective, an overview of the Fund, what it is and where does it fit within the Ministry. While you are at it, you might tell us where the parties fit in this, to whom is this recommendation directed, the Ministry, the Commission, the Fund, a combination, and if so, what is the authority under your legislation or their legislation in a jurisdictional sense. This Committee may have to figure out to whom this recommendation needs to be specifically directed.

Ms. Morrison: Thank, Mr. Bell. I was going to go through the facts of it relatively simply.

As you can see from your materials, there has been a vast number of words written back and forth between our office and the Ministry and the Milk Commission and the Fund, et cetera, during this investigation.

We in fact have had a number of meetings with the Ministry personnel, and I think the easiest way for me to explain to you the facts as we see them and the facts that are in dispute is to go right to the end of the process and deal with those issues which are still in dispute. Before I do that, I would like just to give you have a little bit of background both about the Fund and about the complainants.

The Fund for Milk and Cream Producers was established in 1967 by Regulation under the Farm Products Payments Act. The Milk Commission of Ontario was designated as the board to administer the Fund.

The decision not to pay the complainants in this case was taken by the Ministry of Agriculture and Food as the Ministry which is the umbrella organization over the Milk Commission of Ontario.

The Fund was established to protect producers of milk or

cream against loss through default in payment by a dealer or a processor.

The Fund works in this way, a processor pays into the Fund a certain amount per dollar value of processed cream or milk, and these funds are then used to pay to producers who have not been paid for their product by a processor for various reasons.

I have provided for you today the regulation which sets out the rules governing this fund, the regulation is Regulation No. 391.

It is not necessary for you to go through all of the regulations because there are only a few points which are in issue in these claims.

Specifically, we are looking at Section 7 of these regulations and Section 12. Section 7 --

Mr. Bell: Before you get to 7, can we just take a look at 3?

You mentioned before the role of the Milk Commission of Ontario. Section 3 designates the Milk Commission of Ontario as the Board to administer the Fund.

Ms. Morrison: Right.

Mr. Bell: So, if you will, the part of the Ministry or the part of the governmental organization is the Milk Commission of Ontario, of the Ministry of Agriculture and Food?

Ms. Morrison: That's right.

Mr. Bell: And that particular goat's milk fund, there is not such an animal, okay.

Ms. Morrison: I should note that these complainants went to the Ministry as well when their application to the Fund was refused.

To go back to Section 7, Section 7 sets out the form of the application to the Fund. As you can see, it sets out that it must be made on Form 1, which was not a problem in these cases, and that a separate application shall be made to the Board in respect of each dealer. Here we are only talking about one dealer although we have a number of producers.

I should perhaps be very clear in making sure that we understand when we are talking about producers and when we are talking about processors or dealers. Dealers and processors are the same animal.

The Fund is paid into by processors, but it pays out to producers who have sold their product to the processor and not been paid.

Mr. Bell: So if we were to rule in favor of the Ombudsman then, just to make it perfectly clear, the recipient of whatever settlement then was ruled in favor of, would go to the producer?

Ms. Morrison: The people who owned the goats.

Mr. Bell: The people that owned the goats, not processing plant that went bankrupt.

Ms. Morrison: That's right.

COMMITTEE MEMBER: The producer is the farmer?

Ms. Morrison: That is right.

Mr. Bell: Just while we are on the point, Section 6 of the regulation seems to provide the formula for the payment by dealers who are distributors or operators?

Ms. Morrison: That's right.

Mr. Bell: And we take it that that is the source of contribution to the Fund?

Ms. Morrison: That is how you work out the value upon which the contributions are based, and the contributions are \$4 for each thousand dollars, and then you work out how that thousand dollars is to be calculated by all of the various formulas in subsection 6.

Mr. Bell: Not now, but will you tell us before you finish today whether it is known if the particular processor who went out of business contributed to the Fund, actually did make contributions to the Fund?

Ms. Morrison: Yes, he actually made contributions to the Fund. I don't have the information as to how much, but I am sure the Commission can respond to that.

Mr. Bell: Okay. We are back to 7, I think.

Ms. Morrison: Back to Section 7. Section 7(3) has caused difficulties. It says that:

"An application in Form 1 shall be made not later than the 30th day next following the date on which, (a) the payment in respect of which the application is made became due: or..." and (b) deals with a situation in which, "...any part of the dealer's assets has been placed in the hands of a trustee for distribution under

the Bankruptcy Act."

We are not dealing with (b).

Mr. Bell: This processor never went bankrupt?

Ms. Morrison: These payments were requested at a time when there had not been a bankruptcy declared.

Mr. Bell: But did he ever go bankrupt?

Ms. Morrison: Yes, he did.

Mr. Bell: When?

Ms. Morrison: October 4th, 1982.

Mr. Bell: Well, maybe we should ask this of Board I guess, whether 7(3) provides, in effect, for two time limits, and whether the time limit on 7(3)(b) overrides the one in 7(3)(a).

Ms. Morrison: I will be speaking a little bit to that when I get into the the argument about the due date for the milk.

Mr. Bell: Okay.

Ms. Morrison: Just to complete the review of the legislation, which I will be referring to later, I just want you to know what the sections are, Section 12 is another one which we will be referring to, particularly Section 12(1)(d).

"The Board may refuse to make payment in respect of a claim."

Sorry, (c) first of all:

"Where a producer fails to make his application in Form 1 within the time prescribed by subsection 7(3); or, (d), where a producer has made an arrangement with the dealer whereby the time on which payment becomes due is extended."

Before I go into the reasons why the payments were denied and our view of those reasons, I would like to give you a little bit of background about the complainants. This is not necessarily relevant in some ways, but this is quite an unusual case. We are not talking here about a large dairy industry. We are talking here about small goat farmers.

Most of these people farmed a small holding with not a large number of goats. This was kind of a marginal part of

their operation. They were not sophisticated large dairy farmers.

Some of the complainants have provided us with diaries that they kept during this time. Part of the reason one of them was keeping a diary was the kind of concern about this goat's milk operation, and in that diary you see the kind of worry they had about whether this goat's milk processor was going to be a success or not.

They had originally started out shipping their goat's milk to somebody who was two hours each way from their farm. When this processor set up business very much closer to their farm, they were very hopeful that he would continue in business.

The other thing that becomes clear from reading the submissions of the complainant is that these people believed very much in the goat's milk industry. They are people who believed goat's milk is good for people and that goat's milk should be made available to people. So they were very helpful in trying to get this processor off the ground.

As you will see from the report, they did help out in the processor's plant. One of them actually worked for the processor for \$50 a week for one winter. And some of the complainants lent the processor money.

Mr. Bell: Can you tell us about the complainants that had a sharehold interest in the company?

Ms. Morrison: Yes. The complainants that had a sharehold interest in the company particularly were Mr. and Mrs. J, I believe we call them. The reason they had a shareholding in the company was that they lent the processor some money when things were not going very well, as they often didn't in this business. They lent him between \$3,000 and \$6,000, they are not absolutely sure what the amount was. But in return for that money, because he couldn't pay them back right away, he gave them what he called 2,000 shares of no par value.

There was no share structure of this processor ever disclosed to us, and certainly the complainants didn't know what the share structure was.

Essentially, from what we can understand from the complainants and from our interviews, these shares were kind of a saw, if you will. When the processor couldn't pay back the loan, he said, never mind, I will give you shares in the company and eventually this will all sort itself out. The shares never turned out to be worth anything.

Mr. Bell: Were these people ever officers or directors of the company?

Ms. Morrison: I am advised that they worked on a volunteer basis, aside from Mr. G who worked for one winter at \$50 a week. They were not officers or directors of the company.

Mr. Bell: Did you do a corporate search of the company to determine....

Ms. Morrison: Who the officers and directors were?

Mr. Bell: And whether Mr. and Mrs. J had held positions?

Ms. Morrison: No. But they told us they did not. They were farmers essentially.

Mr. Bell: That does not mean they cannot be officers and directors.

Ms. Morrison: No.

To move on to the reasons for denial. I think the easiest thing to do is to go to the end of our documentation. There are a large number of facts which are not in dispute, which are contained in the various reports.

In our final discussions with the Ministry we got down to three issues, which were stopping the payment from the Fund to these goat's milk producers.

We attended a meeting on August 31st, and the letter on page 63 of your documents is the letter which was subsequently sent to the Ministry outlining the three issues about which there were still serious differences between the Ombudsman and the Ministry.

Mr. Dombek: Excuse me, Madam Chairman, neither the Ministry nor myself have a copy of the documents, the brief that has been presented to the Committee. It would be helpful if she could identify the letter for me a little bit.

Mr. Bell: We will do better than that.

Madam Chairman: We will provide you with a copy of the documentation. It is really just the material that transpired between the two. This will be numbered with the numbers that Ms. Morrison is referring to.

Ms. Morrison: Page 63 then of the document is a letter which set out the three issues over which there was still serious difference.

These three issues had not changed much throughout the investigation, although there had been lots of information

surrounding them.

If you look back at the 19(3) letter, or the report, you will see that the three sticking points were always these three issues.

They were the problem of the so-called late application; the problem of the so-called arrangement, and the problem of the sufficiency of records.

I would like to speak first to the late application, and go back to Section 7 of the Regulation.

To give you a little background about how this business worked, people would produce goat's milk all month long, taking it to the processor daily. At the end of the month then the processor owed them for that month's milk.

The arrangement that was made with this particular processor was one in which he would send out cheques on the 15th of the next month for milk of the last month. So, for example, for July's milk the cheque could be expected on the 15th of the month.

Madam Chairman: For the month of July?

Ms. Morrison: August, sorry.

If you look on page 64, you will see the Ministry's letter to the Ombudsman attempting to clarify this point.

We are quoting in this letter from a letter we received,, or Dr. Hill received, from Mr. McMurchy, dated May 24, 1984. In that letter, he clarified the understanding about the due dates for milk. I would just like to read that paragraph to confirm the way the sales worked.

"A producer sells his milk by the month, with delivery throughout the month; one month is a sales period; on the first day of the next month, the producer now has an account receivable which is the amount due to him; the terms of payment of the amount due is 15 days or the 15th of the next month;..." this is clarified by the Ministry "...a letter from Mr. S dated October 28, 1981, indicated the 15th was the payment date."

Sorry, that is a letter from Mr. G, in your terminology.

I have given you a sheet on which you will see the various dates of claims on the Fund.

Our argument with the Ministry on this point has been, first of all, is the date that is referred to in the Regulation the 15th of the month, therefore giving until the

15th of the following month to claim; that is, for milk sold in July, payment 15th August, 30 days later would be the last day for an application to the Fund, which would be in our interpretation, September 15th.

The Ministry says no no, that is not the way it works. It works that the milk was finished being delivered on the 1st of August or the 31st of July, you have got 30 days after that to make an application to the Fund and if you don't do it in that 30 days it is tough.

The problem with that is two-fold. First of all, they didn't know whether they were going to get their cheques or not until the 15th, that was the usual date to get your cheques, so you couldn't send off an application before you even got your cheque. That gives you only 15 days to claim to the Fund.

As Mr. Bell has pointed out, it is clear in Section 3(b) that there is a 30-day limitation when the dealer's assets have been placed in the hands of a trustee for distribution under the Bankruptcy Act, because that would be a given day, and it says clearly in Section 3, the 30th day following.

So here we have the producers on a regular basis selling their milk during the month, expecting their cheque on the 15th of the month, not getting their cheque on the 15th of the month and having to have their application in by the 30th of the month, according to the Ministry. So they do not get a full 30 days from the time as the Ministry says payment became due.

Mr. Bell: Can I stop you? I may be the only one in the room, we are talking here about an exercise of a discretion equitably in terms of late filing. I think what the Committee needs, though, is before we get to this issue and the others, the Committee needs to get a fairly basic grounding in these facts.

What were these complainants doing vis-a-vis the processor? What are the circumstances of the deliveries and the calculation of the payments? And then working up through to the application.

It seems to me we have got the cart before the horse. I, for one, have a little difficulty pulling all this together, and if I am not alone, then I think you better --

Ms. Morrison: Okay. I can backup and give a few facts about the summer of 1982. Would that be helpful to you?

Madam Chairman: Before you back up totally, Mr. Philip?

Mr. Philip: Is it my understanding that sub 7 of Regulation 391 would only kick in in the case where a farmer

or a producer, shipper, whatever you want to call him, has not received payment and therefore says, I have not been paid, and then he makes the application?

Ms. Morrison: That is right.

Mr. Philip: So 7 does not apply in any other circumstance?

Ms. Morrison: There is no need to make an application to the Fund if you are being paid regularly by the processor. As Mr. Bell points out, I should give you a little more background on that.

These people were shipping goat's milk to the processor on a regular basis.

In July of 1982 they became concerned because the payments were not being made for their goat's milk and eventually in September the processor closed his doors, on the 9th of September.

Since the Fund allows claims for unpaid milk delivered to the processor, they made their applications in September and October.

Mr. Philip: So your point would be that it would be a 45-day lapse possibly under Reg. 7 from the day in which they had sent their last shipment for which they were entitled to payment. Assuming that they would send the last shipment on the last day of the month, then they get paid on the 15th of the month.

Ms. Morrison: Then they have 30 days to apply.

Mr. Philip: Then they have 30 days from that. So it would be 45 days from the last day of the shipment for which they are claiming under Reg 7, or sub Reg. 7, whatever you want to call it.

Ms. Morrison: That is right.

Now, in this particular case the complainants advise us that they did not know this Fund existed until July.

Mr. and Mrs. J, Mrs. J did most of the bookkeeping for Mr. and Mrs. J. She became concerned about the processor and his operation in July, and she talked to the auditor of the Ministry. She said that when he talked to her, he advised her that she could make a claim against the Fund. She also advises, however, that she got the impression from him that if she made a claim against the Fund, he would make sure that all the other producers also knew about what was happening, and that the processor would be closed down as a result of this claim.

These producers had weathered a lot of storms with this particular processor. They had in the earlier parts of that year had difficulty collecting from him. They had often had to, as they say, beg him for their cheques. They had great faith that the processor could continue if they could just all bear with him.

At the time they found out about the Fund, it is Mrs. J's information to us that she learned about the Fund, but she was not advised (A) of the time limit, or (B), she was given the impression that an application to the Fund would put the processor out of the business. That was the last thing these people wanted. They were milking goats, they did not want suddenly to be left with their goats and their goat's milk and no processor for it.

So that in July this information that there was a Fund came to attention of this producer who, of course, spread it to the other producers. At that time, according to the complainants, they had no information about the deadline.

In fact, it is our information, from speaking to the Ministry people that the Ministry people who dealt on a daily basis with the processor and the producers would not necessarily be familiar with all of the details of the legislation.

The summer went on, they kept milking their goats. They were having more problems with the processor. In September, on September 9th when someone went to deliver goat's milk to the processor, they found the processor was not there. The processing plant, therefore, did not operate from September 9th onward.

At that time people said, okay, we better get our claims in, and they claimed. As you will see from the list that I have given you, they made claims on the Fund on the dates noted.

Mr. and Mrs. J were the first because Mrs. J had been the person who found out in the first place about the existence of the Fund.

From our calculations, and I will not go through them in detail at the moment, but at least some of these claims were on time.

Madam Chairman: Excuse me, Ms. Morrison, from your calculations, that is on your interpretation of when payment, the 30-day period began; is that correct?

Ms. Morrison: That is right.

Madam Chairman: So the 45 days after the delivery of the milk, as we have identified it, as opposed to the 30

days after, which is the Ministry's interpretation.

Ms. Morrison: Well, in some cases even on the Ministry's interpretation the claims were on time.

For example, the August claim of Mr. and Mrs. J, that is a claim for August milk sold. That claims, even under the Ministry's interpretation, is on time, because they would have had, by the Ministry's interpretation, until September 30th to make that claim. So the claim for August, the 387, is on time under anyone's interpretation.

Mr. Bell: Help us here. I am a little confused with the sheet you have handed out because of the three notes. Were all of the complainants' applications turned down for the same reasons? And if not, what are the specific reasons for each of them?

J, for example, what were the grounds of the Commission in turning down that application?

Ms. Morrison: The Ministry said that all of the claims were late.

Mr. Bell: So all of them were turned down on the late issue?

Ms. Morrison: That is right. Some of them, there were some other reasons for turning them down.

Madam Chairman: Mr. Johnson?

Mr. Johnson: My reading of this says that Mr. and Mrs. J was turned down because of an arrangement, and Mr. P for the same reason. The other two were denied because of late filing.

Mr. Bell: This sheet is a little confusing.

Mr. Johnson: Is that not correct, Mr. Bell?

Mr. Bell: Sir, I am not sure.

Ms. Morrison: Could I clarify? If you go to page 31 of your material, page 31.

The reasons given by the administrator of the Fund for disallowing the claims are set out there under 1, 2 and 3.

Mr. Bell: Also page 41 of the material, page 3 of the 22(3) report.

Ms. Morrison: Yes, 41 will do just as well and maybe it is better.

Mr. Bell: So notwithstanding what this sheet says, we take it that the claims of all four complainants were turned down in each case for the three reasons given on page 41 or 31, take your pick.

Ms. Morrison: That is right. The claims were all filed too late, was one of the reasons given.

Mr. Bell: All right.

Ms. Morrison: The reason I am starting with the lateness is because it is kind of a universal problem, so the Minister said.

The first point we want to make about the lateness is that some of them were not late even by the Ministry's calculations.

So, for example, if you look at that sheet - which I apologize if it is confusing - Mr. and Mrs. J, under August, claimed, \$387, the value of the milk delivered, \$387. That is milk delivered in August.

By the Ministry's calculations an application to the Fund could have been made any time before September 30th for that milk. The application, as you can see, was made on September 16th.

Mr. and Mrs. O shipped some milk in September, \$243 worth, made their claim in October, which was a timely claim. The same for Mr. P and the same for Ms. N for their October claims.

Madam Chairman: Mr. Elliot?

Mr. Elliot: Could we go through them a line at a time and focus in on the 45-day interval that you mentioned earlier?

Ms. Morrison: Sure.

Mr. Elliot: According to my calculations here, Mr. and Mrs. J, according to your definition, the only late claim was the June claim?

Ms. Morrison: No, the July claim would have been two days late, according to our definition.

Mr. Elliot: Okay. What about Mr. and Mrs. O?

Ms. Morrison: The August claim and the September claim would have been timely, would have been on time.

Mr. P, the August claim would have been 13 days late or 12 days late. Sorry, 12 days late. Ms. N, the August claim

would have been 13 days late, according to our calculation.

Mr. Elliot: Right.

Ms. Morrison: Okay. That is the kind of technical argument about the lateness.

The first point is some of them were not late clearly by anyone's definition. The second point, some of them were a little bit late, like one day late.

The third point about the late application is that we feel that the Regulation did not intend that people should be punished for form only.

There is a section in the regulation, Section 13, which suggests that:

"The Board, having regard to the circumstances of a case, may make payment from the Fund where a claim for payment is made in substantial conformity with subsection 7(3)."

Mr. Bell: Maybe we will not have to deal with this section again with you. Do you know whether the Commission, the Ministry has on other occasions exercised a Section 13 jurisdiction to permit a claim filed beyond the 30-day period?

Ms. Morrison: I am afraid I don't have that information.

Mr. Bell: We will have to ask the Ministry, because you mentioned that a person should not be penalized for want of form. I don't think you have an argument.

The problem I have is understanding how a late claim is a claim that doesn't conform, or that is deficient for want of form. It would seem to me that means where you do not complete all or a substantial part of the stipulated form in the regulations. There is discretion to give somebody who is not sophisticated in these matters relief.

Ms. Morrison: With respect, Mr. Bell, it says in substantial conformity with subsection 3 of Section 7. Not with subsection 1 of Section 7.

Mr. Bell: Okay. That is why I asked you the question, whether there had been an exercise in discretion on other occasions, giving relief against late filing.

Ms. Morrison: I do not know. But it seems to me that Section 13 essentially speaks to the discretion on late filing, not on the discretion on the form of the application. Otherwise it would say in substantial

conformity with Section 7 sub (1).

Mr. Bell: Okay.

Ms. Morrison: Just maybe as some kind of information about the operation of the Fund. Our information in 1985 was that since 1967 there had been some 524 claims against the Fund, 40 of which had been allowed. So perhaps that speaks somewhat to that question.

Mr. Lupusella: Excuse me, did you say 4 or 40?

Ms. Morrison: 40.

Mr. Lupusella: 40?

Ms. Morrison: Yes.

We feel that the section in the regulation was there to allow the Fund the kind of reasonable latitude in accepting these applications which would apply especially to ones which were say one day late, and we cannot see the prejudice to the Fund of allowing these applications.

I would like to move on now to the question of the arrangement. I have told you that these complainants had lots of difficulties with this processor. There is no doubt that there had been times when they had great difficulty obtaining the payment that they were owed from the processor.

The Ministry has characterized the fact that these people often had late payments from the processors as bringing them within the section of the regulation which suggests that there was an arrangement between the dealer and the producer and, therefore, disqualified them from payment under Section 12 subsection (d).

Mr. Bell: We are only talking about J and P now, are we not?

Ms. Morrison: That is right.

In our letter subsequent to our August meeting, we asked the Ministry very specifically for information that would allow us to understand better their view that there was an arrangement here.

You will see in the last paragraph, or the last major paragraph on page 64 of my letter of September 14, the last major issue relates to whether or not there was:

"An "arrangement" between the processor and each complainant whereby the time in which payment became due was extended. We would appreciate it if you could

provide us with the particulars of each arrangement for each of our complainants for each month in question, which you believe existed so that we can properly assess whether this section in fact applies."

Now, it is our view that that section relates to a particular application. That is to say, the whole regulation sets out the way one applies, and one must be able to show within Section 12 that an arrangement was made to delay the particular payment that is applied for if the section is to be useful.

Mr. Bell: Can I ask you a question?

Ms. Morrison: Yes.

Mr. Bell: Why are you asking a question like that at that stage, after your 22(3)?

Ms. Morrison: Because that was one the reasons that the Ministry continued to hold out as not accepting our recommendations. They said there are three reasons why we will not accept our recommendations, this is one of them. We met with the Ministry in an effort to clarify that, and as a result of that meeting said, please supply us with documentary evidence of your view that there was an arrangement.

Does that answer your question, Mr. Bell?

Mr. Bell: Well, Dr. Hill did not have any problem in his 22(3) report coming to a conclusion on the arrangement issue. At the bottom of page 4 and into page 5, it comes down very squarely on the available evidence.

"It does not seem reasonable to suggest that it was the action of the claimants that led to the late payment or that there was an attempt by the claimants to circumvent payment provisions."

And then speaking specifically about P:

"...he denies there was an arrangement, because the processor was not late in paying him prior to the summer of 1982."

Why would you then engage them in a dialogue in September 1987, a year and a half after that, on what the evidence is?

Ms. Morrison: Because they continued to claim that one of the strong reasons for denying the recommendation was that these complainants had an arrangement.

We had a suggestion at the meeting that perhaps there was something we didn't know about these complainants, and

our sense of it was, we cannot change our mind on a recommendation on the basis of a sense that there is something wrong here. We needed documentary evidence.

Mr. Bell: Okay.

Ms. Morrison: The response to that letter is the letter I have handed out today, and I would like to just go through their reasons on the arrangement with you. I am sure that you will see, as I do, that what they have set out as arrangements with the processor cannot be the kind of arrangements which are envisaged by Section 12 subsection (d) so as to disqualify these people for money for the milk that they had delivered to the processor.

Mr. Bell: Who is Mr. Collin? Is he from Marketing and Standards within the Ministry? What is his relationship to this case?

Mr. Dombek: He is the Assistant Deputy Minister of Marketing and Standards.

Ms. Morrison: He is addressed on page 63.

Mr. Bell: All right.

Ms. Morrison: On page 4 of the letter that was received from the Ministry on January 19th, are the Ministry's arguments again about the arrangements.

We asked for specific documentation about these specific claims, that is the claims for June, July, August and September of 1982. The Ministry has responded by saying things such as the complainants were not worried when the processor delayed payments for June, July, August period of 1982. Of course they were worried, that is why they approached the Ministry to ask about the problem. That is when they first learned about the Fund.

We have a letter from a complainant outlining the details of her contact with the Ministry at that time, and it is clear throughout from her letter and from the diary she kept at the time that they were very concerned about this processor.

Mr. Bell: How about the point made just ahead of that?

Ms. Morrison: The fact that the producers admitted they held cheques when requested to do so by the processor, two points about that. The first is that if the processor told them the cheque was going to bounce, do not cash it, they probably, sensibly, did not cash it until they thought it would not bounce. That doesn't seem to me to be an arrangement with a dealer whereby the time in which payment becomes due is extended.

Mr. Bell: Well, do you have specific evidence that they were informed by the processor that these cheques were going to bounce?

Ms. Morrison: Yes.

The second thing is that none of them had any cheques for July, August, September, which they could have been holding. So it certainly did not apply to these applications.

Mr. Bell: Okay.

Ms. Morrison: "The fact that the complainants either worked for or were shareholders in the processor clearly demonstrates there was an arrangement."

That seems to me to be just an assertion on the part of the Ministry which would have to be backed up by some kind of either documentary evidence, or some evidence from someone that there was in fact an arrangement.

The fact that in a small rural community someone worked for the goat's milk producer doesn't necessarily mean that they made an arrangement within the statutory definition of "arrangement" in the regulation to delay payment for the milk.

Again, there is no suggestion that the working for or the shareholding had anything to do with the claims for June, July, August and September.

There is no doubt from the details provided on that page that the processor was in financial difficulty and the producers knew it.

For example, in the second paragraph from Mr. Beckley's files, cancelled cheques for November and December, payments to all producers were not available. Nobody got paid.

The Ministry says that clearly indicates delayed payment, which it does, there was certainly a delay; no payment, which it does, there was no payment, or payment in kind, there is no evidence that there was payment in kind.

In any case, neither delayed payment, no payment, or payment in kind is necessarily an arrangement within the meaning of the regulation.

Furthermore, November and December were not the payments being claimed. The payments being claimed were June, July, August and September.

The same arguments apply to the rest of the information on that page. All of these pieces of information suggests that there were delays in getting paid for this goat's milk.

You have to take your goat's milk in the day the goat gives it, you cannot keep it around hoping that you are going to get paid for last month's goat's milk. These people took their goat's milk in on a regular basis, and they were delays in getting paid. By the end of the month they were owed a certain amount for their milk and they were not getting paid for it in a timely way.

Mr. Bell: What do you say is the definition of "arrangement" under 12(1)(d)?

Ms. Morrison: That is a very difficult question, and I am not trying to avoid your question, but I will suggest that we have asked the Ministry on a number of occasions to tell us what kind of evil this subsection was addressing, because if we knew what kind of evil it was addressing, we would have a better idea of what an arrangement looked like if we found it.

Mr. Bell: Did you ask them what their definition of "arrangement" was under this section?

Ms. Morrison: Well, their definition of arrangement is any delay in payment obviously, because they believe all of these things are arrangements.

Mr. Bell: Which is either agreed or acquiesced in by the supplier?

Ms. Morrison: Right. Well, not even acquiesced to, just there was a delay. In most of these cases the supplier was not acquiescing to it; he just did not get his money.

Mr. Bell: Well, is it your understanding that the Ministry's definition includes a unilateral withholding of payment on the part of the processor?

Ms. Morrison: I would have to say yes, because some of these were unilateral withholding of money on the part of the processor, and they have been cited by the Ministry as evidence for an arrangement.

Mr. Bell: Okay. So you do not know. We will have to ask them.

Ms. Morrison: That is right.

If fact, just for your information, we did ask the Ministry on an occasion to give us more information about what this arrangement amounted to, and what the evils were that it was intended to prevent.

One of the people from our office, a counsel from our office was speaking with Mr. Dombek at the Ministry trying to sort this out on July 18th, 1986, and essentially the

information we got was that the section was introduced because in the farm products area a lot of producers were making arrangements with the processors, deferring payments so that the market price of the commodity could be watched. This was some form of speculation where presumably if the prices went up they could capitalize on this. Sort of like the futures market, and producers and processors were making arrangements to take advantage of this.

Now, I have tried very hard to figure out how that would work in the goat's milk industry. First of all, there was a fixed price for goat's milk set March 31, 1981, by this processor and it never changed throughout this period.

Secondly, I can't quite get a grip on how that arrangement works. Somebody gains and somebody loses if the price goes up. The parties are reversed if the price goes down. But I cannot, in my naivete I guess, understand exactly how the arrangement works so that somebody makes money off it.

In any case, we are not satisfied that there had been any arrangement. We couldn't find out what an arrangement would look like if there had been one, and we do not feel that the arguments in the January 19, 1988, letter change our position in that respect at all.

Mr. Bell: For J and P what are the specific facts that you are relying on in support of the conclusion that there was not an arrangement that is caught by that section?

Ms. Morrison: With respect, I think it has to be shown that there was an arrangement, not that there was not.

Mr. Bell: Well, you have said in the material there is not an arrangement.

Ms. Morrison: That is right. The Ministry has relied upon the delays in payment as evidence that there was an arrangement. They have never given us anything other than that as evidence that there was an arrangement.

The producer doesn't have to prove that there was not an arrangement. The Ministry, under the section may refuse, notice they do not have to, they may refuse to make a payment in respect of a claim...

"Where a producer has made an arrangement with the dealer whereby the time on which payment becomes due is extended."

Mr. Bell: I understand all that. But we are interested in knowing what the Ombudsman relies upon in support of his conclusion there is not an arrangement. You are relying on the absence of any evidence you say.

Ms. Morrison: We are relying on the fact that we do not feel just not being paid on time for several months is evidence enough to amount to an arrangement within 12(d).

Mr. Bell: Is the acquiescence in a continuous late payment an arrangement?

Ms. Morrison: Under the circumstances I would not say so.

Mr. Bell: Why?

Ms. Morrison: What should the producer have done?

Mr. Bell: No, no. Why do you say it is not an arrangement?

Ms. Morrison: Because the producer had no possibility of doing anything except acquiescing. At that time they did not even know there was a fund to apply to.

Mr. Bell: You are saying that anything that has elements of the imposition of a term of payment, like a unilateral change in the circumstances, is not an arrangement within this section?

Ms. Morrison: That is right.

Madam Chairman: Mr. Carrothers?

Mr. Carrothers: I wanted to clarify something. Were O and N always paid on time? It was just J and P that had the delays?

Ms. Morrison: Mr. O I believe never had a problem with delays. Can I just check that?

Sorry, Dr. Lee reminds me, on one occasion everyone was paid late or not paid, but Mr. O essentially did not have problems of regular late payments.

Mr. Carrothers: These regular delays we are talking about were only in relation to certain of the people giving milk to the producer, not every person giving milk to the producer?

Ms. Morrison: I think they were some people sometimes and other people other times, but I think Mr. O happened to be --

Mr. Carrothers: He paid some or not others. So for some reason, certain of these people were having delayed payments.

Just talking about whether there was an arrangement or

not, it seems interesting that in some cases some were either not receiving it and others were getting paid on time.

Ms. Morrison: Sorry, it is Mr. P's case. Mr. P suggested that there was no arrangement with him because the processor was not late in paying him prior to the summer of 1982. That is in our Section 22 report, at page 43.

Mr. Carrothers: So Mr. J and Mr. P suffered the late payments and O and N basically, except for one occasion were paid on time?

Ms. Morrison: Mr. P was paid on time most of the time. Mr. J and Mr. O, Ms. N suffered late payments.

Mr. Carrothers: They all suffered late payments.

Mr. Bell: That is not what your material says about N. N was denied, one, because it was late but, two, because there was inadequate records.

Ms. Morrison: Now, we should not confuse late application with late payment here.

Mr. Bell: Late application, everybody was refused by late application.

Ms. Morrison: Yes, that is a different question.

Mr. Bell: N was only refused additionally by inadequate records, not by an arrangement?

Ms. Morrison: An arrangement, that is right.

Mr. Carrothers: But I was going to the point of, was everybody not receiving payment on time, but were only some not receiving payment on time. I think you said that J and P were not receiving it on time and O and N were receiving it on time, except for one time.

Ms. Morrison: The 22(3) report suggests that Mr. P was the one who got paid on time except for once.

Mr. Carrothers: And everybody else was....

Ms. Morrison: I think that is correct.

Mr. Carrothers: Except that the Ministry claims an arrangement only for P and J and not for O?

Ms. Morrison: That is right.

Mr. Carrothers: And N.

Ms. Morrison: Okay.

Madam Chairman: Mr. Bossy?

Mr. Bossy: Yes. I think it is revelant here, we are talking arrangement, it ties in, and I would like for clarification, the first date that Mrs. J was made aware of the Fund. You made that statement earlier. It is relevant.

Ms. Morrison: Mrs. J doesn't have the exact date, but it was towards the end of July. It appears at page 40 of our report.

Mr. Bossy: Okay. Now, having statements made that all these people were not aware of the Fund, they were in business with the processor, these producers were not aware that there was a Fund. Would you not then have to agree that these people would have a tendency to make arrangements to get by because they had no alternative, in their minds, as far as collecting or a source. I am trying to tie the arrangements with the fact of no knowledge of any other place to recover funds.

Ms. Morrison: I think that is a very good point. In fact, if they did say to the processor, yes, we will hold your cheque for a few days, they never would have thought that it had anything to do with a subsequent claim against the Fund.

Mr. Bossy: Because that would lend the producer, if I was the farmer and I had goats, I would make any kind of arrangement as long as there was - and there had been some funds flowing, maybe not on regular time. Then you would tend to keep the processor in business.

You said that these people, the analysis of that, they were making all kinds of side deals. I am trying to piece that all together.

But always remembering that the people did not have any knowledge. Really, going on page 42 where there is a certain Mr. Whitehead and Mr. Bird of the Dairy Inspection branch, neither one warned her of a 30-day limit, the investigator contacted, Mr. Bird and Whitehead were not aware of the 30-day time limit. All this leads for me that nobody made these people aware that they had protection or some protection by a fund that they could draw on in case something went bad.

Ms. Morrison: I think that is true. In fact, one year after this processor closing, the Fund did send out information to all producers telling them about the existence of the Fund.

Mr. Bossy: But that was after.

Ms. Morrison: That was a year later, after the demise of the processor.

Mr. Bossy: So Regulation 391, they had no knowledge of that?

Ms. Morrison: Our information is that they did not know about the Regulation.

Madam Chairman: A supplementary just on this point?

Mr. Philip: I think Mr. Bossy is making a key point. If you look at page 42 you see that one year after, on July 18, 1983, the Dairy Inspection branch sent out copies of Regulation 391 to the producers of milk.

Now, to me, that is an admission that the process was somehow flawed. The process was flawed inasmuch as neither was there an obligation under the regulations for the factory to provide the producers with Regulation 391 to inform them of their rights, nor was there any process by the Dairy Inspection branch to send out to the producers, of which they would have a list after the first payment was made, a copy of 391.

Ms. Morrison: That is right.

Mr. Philip: It is very hard to exercise a responsibility under a regulation if nobody tells you of the regulation.

Ms. Morrison: And hard to know what an arrangement might be within the regulation.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Yes, Madam Chairman. Just to go back a little for clarification on both arrangement and possibly back to records.

Did you say that Mr. and Mrs. J loaned the processor \$3,000 to \$6,000?

Ms. Morrison: Yes, they did.

Mr. Johnson: Was it three or was it six?

Ms. Morrison: We have information from them that it was between \$3,000 and \$6,000. It was in small sums. So that they didn't give us an exact total.

Mr. Johnson: Well, I find this extremely hard to understand and accept. I do not know of too many people that would lend \$3,000 or \$6,000 and not know how much it is.

Ms. Morrison: My understanding is this wasn't a single time loan. This was lending the processor money when the processor was in difficulty.

Mr. Johnson: Even so, I would assume that any average intelligent person would keep a record of how much they loaned, we are talking about three, four, five, six thousand dollars. I understand even some people do this between husband and wife.

I question very much, if they didn't keep this record, then I would assume that the Ministry would have good reason to say that they lacked other records.

Ms. Morrison: I am going to speak to the sufficiency of records next. Do you want me to respond to that?

Mr. Johnson: No. I was wondering, this arrangement bothers me because I am not sure if there is a current definition of what it means.

But I think also you stated that they loaned the processor \$3,000 to \$6,000, they are not sure is, and also then received something like 2,000 shares.

Ms. Morrison: Yes.

Mr. Johnson: And they are not sure.

Ms. Morrison: No, they have 2,000 of no par value.

Mr. Johnson: But there is no value.

Ms. Morrison: That is right.

Mr. Johnson: So they could have be worth 20 cents, in this case nothing.

Ms. Morrison: Nothing.

Mr. Johnson: Or they could be worth a substantial amount of money.

Was this in any way construed as an arrangement?

Ms. Morrison: Those shares are worth nothing because the processor went bankrupt.

Mr. Johnson: Now, I am just wondering if this could be construed in any way as a type of an arrangement at the time that the loan was made.

Ms. Morrison: Well, it is not an arrangement for late payment as suggested by Section 12.

Mr. Johnson: Okay.

Madam Chairman: Mr. Elliot?

Mr. Elliot: I have two or three questions here with respect to this document that we got this morning. It is dated the 19th of January. When did you receive the document?

Ms. Morrison: The 19th of January. I believe it was couriered to us.

Mr. Elliot: It was couriered to you.

From the document there are some fairly serious allegations with respect to the weighing of the milk, that type of thing.

Ms. Morrison: I am going to get to that under sufficiency of practice.

Mr. Elliot: The question is: Was there any time in 1982 when the licence of the processor was in question because of the way he ran his operation?

Ms. Morrison: Not that I can aware of. His licence was renewed in 1982.

Mr. Elliot: That is what I understand. Whoever wrote this first part was there in 1982 and renewed the licence?

Ms. Morrison: That is right.

Mr. Elliot: So as far as the people responsible for this operation were concerned, it must have been running acceptably well or it would not have been renewed?

Ms. Morrison: One would think. In fact, if we can go on to sufficiency of the records, I just would like to comment about the scales.

Mr. Elliot: I have one other question with respect to the receipt of this a week ago. You probably have had a lot more time than we have had to assess this, because it is fairly comprehensive, it is five pages, and it does address all of your concerns. Did it substantially change your mind in any way?

Ms. Morrison: No, it did not.

Madam Chairman: Before you go on to sufficiency of records, Mr. Lupusella had a question and it may be on this point.

Mr. Lupusella: Yes, my question has been raised by Mr.

Elliot, which was related to the discrepancy of weight when the milk was shipped, and you are going to make a comment on it.

Ms. Morrison: Yes, I am going to make some comments on that, and of course you could ask questions if I do not address the point.

Madam Chairman: Is there anymore questions relating to the arrangement at this point, or would you like to wait until after sufficiency of records?

Please continue.

Ms. Morrison: I will try to be very brief because we have been rather long here.

Page 2 of a letter that we received from the Ministry in January talks about the sufficiency of the records. I should let you know where these records came from. We attached records to our letter of September 14th, and we have attached those as well, and they make up page 66 to 69 of your materials.

Mr. Bell: Ignore the names.

Ms. Morrison: That is right.

These records were obtained by the Ministry auditor in the weeks after the closing of the processor. These records were given to us by the Ministry, out of Ministry files. These are not records that were made up by the producers. These were records which were obtained from the processor. Just so you know where they came from.

We felt that they at least gave a kind of minimum amount that could be used in assessing these claims and that the claims should not be thrown out on the basis that there were no records when there clearly were some records.

Mr. Bell: The report indicates that these records, you conclude these records were made retroactively. What do you mean by that and how retroactive?

Ms. Morrison: These records?

Mr. Bell: Yes.

Ms. Morrison: The auditor went into the processor in the month following the closing, that is October 1982; is that correct?

Dr. Lee: That is right.

Ms. Morrison: In the month and month and a half after

the closing of the processor is our understanding.

Mr. Bell: No. Page 43, page 5 of the 22(3) report, second paragraph under lack of evidence:

"The dates of some of entries in the book are not in sequence, showing that the entries were made retroactively."

Ms. Morrison: That is another question.

Mr. Bell: Other records?

Ms. Morrison: The records that you have at the back of your information are the summary records for the month in question that were made after the closing of the processor by a Ministry auditor.

On page 43 we are talking about the general records that were kept by the processor, which looked like this. They sometimes had things out of date order. The reason they had things out of date order is the processor would sometimes write things down after the fact. So that he would write down an entry for 415 and then right after it an entry for 414.

Mr. Bell: This is in the auditor's own hand, he says he got from the records he reviewed.

Ms. Morrison: That is right. So the summary you have is a summary of the records obtained by the auditor when he went into the processor after the processor closed down. We felt that those would be sufficient to make some payment on.

We sent them over the Ministry, and in this response in January these are the things they say about it.

You will see at page 2, first of all, they say there were no scales, so that the "weights recorded were eyeballed estimates by a count of eighty pound cans."

There are a couple of points there. One is that probably these people were pretty good at these kinds of estimates, and this is, after all, a market deal. So, therefore, there is no particular reason why they should be over or underestimated. If they overestimated, this person loses; if they are underestimated, this person loses. On the whole one would expect that these people, experienced as they were in handling 80 pound cans, would have a pretty reasonable handle on this.

Madam Chairman: Mr. Philip?

Mr. Philip: Can you point to any requirement in the regulations that says that there has to be scales?

Ms. Morrison: No, I cannot.

Mr. Philip: Is it reasonable to have such a regulation if it is important.

Ms. Morrison: I think that is a point.

My way of looking at it was, the Ministry had been into this processor's plant many, many times, he was a licenced processor, they knew there were no scales here. If it was the view of the Ministry that having no scales disqualified a claim under the Fund, they should have told people that they were not covered by the Fund for reasons that the processor had no scale.

There is no suggestion that the people were ever warned that the Fund wouldn't cover them because there were no scales. If fact, it would have been useful because then they would have known about the Fund, which they didn't know about. But they were certainly not made aware of this problem.

Secondly, in the second paragraph, the last sentence says:

"Also without pick up slips, a duplicate of which should be left with the shipper, there is no assurance that all milk pick up is included in the record supplied."

That, of course, will only lead to an underestimation of the amount of claim. It certainly would not help the producer if all of the milk that is picked up is not recorded. They may get paid a little less than they otherwise should have got.

The next paragraph says:

"This study of records also indicated that the processor estimated weights on the heavy side."

First of all, it is very difficult for us to know how, looking at those records, they could tell that he estimated cans on the heavy side.

Mr. Bell: It tells you right in the next sentence.

Ms. Morrison: Well, I do not think those two sentences exactly go together. Estimating weights on the heavy side probably means looking at a can and saying it is heavier than it is.

But in any case, there is two points about that; one is the Fund would have taken too much money from the processor paying into the Fund if he was estimating heavy, so he has

paid more than his share into the Fund.

The second is that when these people started shipping to another processor, it says their number of pounds of milk or cans of milk were much lower.

There are a couple of reasons for that; one, the amount of milk that is given by milking animals vary substantially with the season, as I am sure most of you know. So it is not always the same amount of milk you ship month by month.

The second thing is that some of these complainants, once they could not sell their goat's milk to this processor, once they were not getting paid for the milk, sold some of the goats for money, because they needed money.

So in some of our complainants' information we can see by their diaries that they sold goats when they could not get money for milk. So their production of milk would have reduced.

Mr. Philip: Could it also be explained by the fact that it is normal to crop in September or October and November rather than hold them over the winter, in that there is likely to be a heavier market for goats made in the --

Ms. Morrison: For goat's milk products?

Mr. Philip: I noticed in the fall, in the local grocery stores where we are deal - my family eats goat's meat and rather enjoy it - that often there is sales in the fall on goat's meat. Maybe there is sales at other times, but it just seems to me that leading up to Christmas, a number of stores had goat's meat on sale.

Ms. Morrison: It is often not unusual for farmers to try and reduce the number of animals they have to keep over the winter.

Mr. Philip: So they do not have carry them over the winter.

Ms. Morrison: The other thing that one of our producers that complained to us did, was begin feeding the goat's milk to calves and raising calves instead, because they felt that they could not sell goat's milk, they might as well use it for something else, so they began feeding calves. Once they had done that, then they could not send that milk to a new processor because they needed it to feed the calves.

Madam Chairman: Yes, Mr. Lupusella?

Mr. Lupusella: Talking about shipment to another plant and they had claimed the lower shipping weights that they had at the processor, are we involving in this statement the

person in question in this case as well?

Ms. Morrison: Sorry, I do not understand the question, Mr. Lupusella.

Mr. Lupusella: Based on the statement of the Minister that:

"This study of records also indicated that the processor estimated weights on the heavy side. When several of these bulk milk shippers quit the processor and started shipping to another plant, they had much lower shipping weights than they had at the processor."

Now, are we including the man in question in this case, shipping milk as well?

Ms. Morrison: Some of the complainants.

Mr. Lupusella: Some. But not the person, Mr. J? Was Mr. J involved on this shipment as well?

Ms. Morrison: Shipping to another processor?

Mr. Lupusella: Yes.

Ms. Morrison: I do not know, Mr. Lupusella.

Mr. Lupusella: You do not know, okay.

Madam Chairman: Did you not actually say that they went out of the business of sending the milk but feed it to their calves instead?

Ms. Morrison: Mr. and Mrs. J did that to some extent. Whether they shipped some goat's milk to another processor after that I am not sure.

Madam Chairman: That would be an important point, if in fact they were using some for calves and shipping some, then that would account for a substantially less decrease.

Ms. Morrison: Right. Another point needs to be made about the next paragraph:

"A number of producers delivered their own milk in cans and recorded their own weights, a fact verified by Mr. and Mrs. J and Ms. N."

We cannot not find any basis for this statement. Mr. and Mrs. J and Ms. N have not verified that. In fact, when you look at the records, the handwriting in the records is all the same.

Apparently the only person who made records of receipts, and perhaps that is why he made some of them retrospectively, was the processor, the person who ran the processing plant.

So we can find no evidence that anyone ever entered their own weights in the records.

The next paragraph suggests that:

"There is a suspicion that the invoices were prepared after the processor ceased to operate in September and before Dr. G was required to provide financial records on November 1st, 1982."

It is difficult for me to understand even if he did do this, and we have no information that he did, why he would overestimate the amount of milk received. It does not make very much sense, to me, for a processor to overestimate the amount of milk for two reasons; one, he has to pay more into the Fund if he overestimates the amount of milk, and it just does not seem sensible to me in any of his income terms why he would want to suggest that he received more milk than he in fact did.

There is an error on page 3, according to our information, about the milk delivered in September. The Ministry suggests that 7,091 pounds of milk were recorded as delivered in September. The processor's book recorded 2,756 for September. The very last sentence in that paragraph says:

"I find no proof that processor received or processed milk in September."

There is evidence that he received milk in September. We do not really care what he did with it. If he processed it or did not process it, the producers still brought him the milk, and this Fund is not there to pay producers only when the processor has processed their milk. It is there to pay producers who did not get paid for delivering their milk.

My very last point, so I won't keep you any longer, is point 3 about the provincial auditor. If you will turn to page 50 of your book, and ignore the names, again I am sorry about the problem of anonymizing in these materials.

Mr. Bell: What page?

Ms. Morrison: 50. We wrote to the auditor during our investigation to try and find out from him whether he felt these were sufficient records or not, and this is the response we got.

The first paragraph just suggests why he is writing to us. The second paragraph is the one which is important.

"As discussed, our work was strictly of a technical nature whereby we assessed whether the Fund's decision to disallow the claims was in accordance with the applicable regulation. Our conclusion was that as most of the claims in question were, in fact, filed after the time period allowed in the Regulation, the Fund was technically..." and I stress the word "technically" "...justified in disallowing those claims."

The auditor said nothing about sufficiency of records.

Madam Chairman: Mr. McLean?

Mr. McLean: A question on that paragraph. Most of the claims, how many claims was there other than the ones that you have here that you are aware of? Was there several?

Ms. Morrison: They were several other claims, those people did not complain to us. So this represents the ones that we had people complain to our office. I believe there might have been another half dozen claims.

Mr. Dombek: There was a total of 12.

Madam Chairman: There was a total of 12, is that what you said, Mr. Dombek?

Mr. McLean: Thank you.

Madam Chairman: Mr. Philip?

Mr. Philip: If we add up the arrears of the claims that you presented, we are talking about \$5,114.32. Now, you are claiming for two months arrears because of the limitation under the regulation, whatever it is, it is second to the last one, if I remember correctly. The 60-day regulation under 14. What is the total amount that would in fact be paid out were your recommendation accepted?

Ms. Morrison: I believe the total amount is just under \$4,000, about \$3,800.

Mr. Bell: I am sorry, can you spread it among the four complainants, please?

Ms. Morrison: Yes, I can. I think that we would suggest payment of the two latest months -- No. If we take the first two claims for each, that is June, July for Mrs. J; July, August for Mr. and Mrs. O; June, July for Mr. P, and July, August for Ms. N.

Mr. McLean: Why would you give two for August and leave

two out?

Ms. Morrison: It can only be for a 60-day period according to the limitation in the statute. We agree that the Fund cannot pay out more than 60 days worth of claims, that is Section 14.

Madam Chairman: Mr. Philip?

Mr. Philip: If Mr. Bell or someone else wants to continue questioning on the figures, but I have a question on the provincial auditor.

Ms. Morrison: Yes.

Madam Chairman: Any further questions on these figures?

Mr. Philip: Can you give us the reference of the provincial auditor, was it just during a routine audit of the corporation? In other words, of the Fund for Milk and Cream Producers that he turned in his report?

Ms. Morrison: As far as we know it was a routine audit. Page 3 of their submission to us in January just says the provincial auditor after reviewing the claims supported the position.

They had said that the auditor supported the position all along, which is why we wrote to the auditor and asked for information about that.

Mr. Philip: Now, would this have been a contracted out audit or one done the provincial audit's office?

Ms. Morrison: In our letter he says our audit of the financial statements of the Fund for Milk and Cream Producers for the year ended March 31, 1983.

Mr. Philip: Well, this may be something that I may want to take up with the provincial auditor. But it seems to me quite out of keeping with the provincial auditor not to comment on the need for checks in the process.

First of all, you have a producer that is not informed of the regulations in the programming which he has entered into which money may be sent out, and that is quite contrary to even the HUDAC home warranty program that is filled with such atrocities and abuse of process, at least hands the new homeowner the regulations. It it may not be worth much, but at least they get them.

Secondly, the factory is not informed of the need to take weights, and one would have thought that the provincial auditor would have commented on that, if that was a check on the monies that might be sent out.

Thirdly, as the provincial auditor has commented on in numerous other occasions, there is usually the need when a new participant enters a program, namely a factory or some other - and we have just been through Idea Corporation, so we know what that was all about - for a little more vigilance on the part of the governing government agency during the early stages to ensure that there is some compliance and that things are okay at least during the first few months until we see that things seem to be functioning.

Yet you are saying that the provincial auditor did not comment on any of these processes that appear to be certainly less than adequate by the corporation, namely the Fund for Milk and Cream Producers.

Ms. Morrison: This is all we got from the auditor. We do not know what their report might look like. They have relied upon the auditor as authority that there were insufficient records. So we wrote to the auditor saying, were there insufficient records.

Mr. Philip: So their report is simply not a complete report which they might have given to their client, namely the Fund for Milk and Cream Producers, but rather a response to your enquiry?

Ms. Morrison: The auditor's report about the Fund for Milk and Cream Producers we do not have. What we do have is a letter from the auditor answering our question about their audit, and that is what appears at page 50.

Mr. Philip: Well, the process of the provincial auditor, so that members of the Committee that may be new, and not members of the Public Accounts Committee would understand, is that the auditor would only turn out a public report if the offending body did not comply to some of his suggestions.

So the auditor - and we may want to talk to Ministry staff on this - the auditor may have well pointed out deficiencies to them, and as long as they complied and said, yes, we are correcting it, and it appears that they have corrected it, at least the problem with letting the farmers know that there is a program and that there is a Regulation 391, and that there are certain responsibilities for the farmers under those regulations, which they did not know about, he may well have commented, and that would be an internal working document that nobody would have their hands on, and indeed the auditor would refuse unless he had the direction of a committee of the Legislature, something like that, to produce the paper.

Madam Chairman: Are you concluded, Ms. Morrison?

Ms. Morrison: Yes, I am.

Madam Chairman: Mr. Bell?

Mr. Bell: Just before we are, I think we have got to tie this up.

The Ombudsman concludes in his report that the denial of the applications for payment is in the language of your legislation, and I think referred to somewhere in the report, is unreasonable.

Ms. Morrison: That is right.

Mr. Bell: Page 8 of your report, page 46, the first two paragraphs seem to me to fairly succinctly tie it all together as to the facts that you are replying upon, and the reason for the conclusion of unreasonable; is that correct?

Ms. Morrison: That is correct.

Mr. Bell: The recommendation is that the first 60-day period in each of the claims, as we have just discussed, be paid. The recommendation is directed to the Ministry.

Ms. Morrison: That is right.

Mr. Bell: Should it be also be directed to the Commission?

Ms. Morrison: I have a document from the Ministry which is a memorandum from the Assistant Deputy Minister of the Ministry of Agriculture and Food to Mr. McMurphy, who is the former Director of the Fund, re this processor, and I can give you a copy of this, in which the Assistant Deputy Minister says, and I quote:

"I approve the recommendation of April 25th which is a recommendation that the claims be denied, and the Minister has no objections, as you can see from the attached."

The attached is a memorandum to the Assistant Deputy Minister from the Minister of Agriculture saying:

"I intend approving this attached recommendation from John McMurphy subject to any concerns you may have."

So the refusal of the Fund to pay the complainants their claims was subject to the approval of the Minister, and he gave his approval, which was forwarded to the Director of the Fund by the Assistant Deputy Minister. So it seemed appropriate to us that the Ministry should take the responsibility.

Mr. Bell: As long as we understand that you are

comfortable and believe that a recommendation made by whomever to the Ministry, will result in the implementation of the same by the Commission. Your colleague beside you is shaking his head, so we will have some discussion from him later in the day.

It is not for us to tell you to whom the recommendation is or should be addressed; it is for you to tell us what you are comfortable with.

Ms. Morrison: Well, the reason our recommendation is made to the Ministry is that the Ministry approved the decision of the Milk Commission to refuse the payment out of the Fund. If the Ministry has the power to approve the refusal to pay out of the Fund, it would seem reasonable that the Ministry has the power to order the Fund to pay.

Mr. Bell: Why did you not make the recommendation to the Commission, though, in addition to the Ministry?

Ms. Morrison: Good question.

Mr. Bell: Is there an answer?

Ms. Morrison: I think we believed that the Ministry was responsible for the Milk Commission because the Ministry approved the decisions about whether money should be paid out the Fund.

If we sent the recommendation to the Milk Commission they could just say, well, we cannot do this because the Ministry has to approve and you did not recommend to the Ministry.

Mr. Bell: If you sent it to both, you would catch them both, though.

Ms. Morrison: We might have done. That kind of technicality is quite a lot like the technicalities that have been involved in this claim all along.

Mr. Bell: Okay. I have no further questions.

Madam Chairman: I have just one. I am looking at the claims we have before us, the 60-day period, and let us just move even to Ms. N who made a claim on October 28th.

I guess I am wondering where you got your 60 days, in that if we are to extend what we consider the time period to be from the 30 days from the last day the milk was delivered and look at it from the 30 days from the date which it should have been paid, so in fact we are looking at your 45-day period interpretation, even with that, July and August, and July in particular was very, very, very late in terms of claim. We are talking 28 plus, 58 days in the

Ministry's interpretation, so 58 days.

So what is the basis of here, where can we base our claim on, is it on Section 7(3) or 12?

Ms. Morrison: Section 14.

Madam Chairman: Section 14, that allows it? No. Section 13 allows that the circumstances of the case may take into it.

Why did you not, say, for instance, for Ms. N, look at August and September, August being 13 days late in your interpretation and September being on time?

Ms. Morrison: Our recommendation was made for the first two months because a number of these producers reduced their shipments to this plant when they were not getting paid during that summer. So it seem sensible to that us that when they made an application for all of these payments which were missed, that we should, using the terms of Section 14 of the Regulation, limit the paying out to a period of 60 days and take the 60 days in which they shipped the most milk.

Madam Chairman: Mr. Carrothers, did you have a question?

Mr. Carrothers: Just really the same. I wondered why you chose the first instead of the last, because the last 60 days, some seemed to be on time perhaps, and the others very close to being on time. I guess what you are saying is you have chosen the highest 60-day period.

Ms. Morrison: That is right. They did not get paid for any of this milk, and it seemed a sensible recommendation to us that they should get paid for as much of it as possible.

We have argued that the lateness should not be used against them in any case. But if this Committee were to decide that they could only support those ones which were on time, then that recommendation from the Committee might be a different recommendation.

Madam Chairman: That is exactly what my point would be. That if the Committee decides that the late filing cannot be agreed to, that we do find everything late except for those that were on time no matter whose interpretation, my concern would be here that in fact those that were on time, under your recommendation, would be denied under the Fund.

Ms. Morrison: I think the Committee is free to make a recommendation which takes that into account.

Madam Chairman: Mr. Carrothers?

Mr. Carrothers: It is another point. I just wondered if you happened to know if any of these producers filed claims into bankruptcy?

Ms. Morrison: Not that we know of.

Mr. Carrothers: You do not have any idea whether they did or did not?

Ms. Morrison: I am afraid we do not have that information.

Madam Chairman: Any further questions at this point before the we move over to the Ministry of Agriculture and Food?

Mr. Dombek, you will be speaking on behalf of the Ministry of Agriculture and Food?

Mr. Dombek: Thank you very much, Madam Chairperson.

Beside me is Mr. Kenneth Knox who was the Chairman of the Milk Commission of Ontario and is now the Chairman of the Farm Products Marketing Commission.

As you may be aware, the Legislature in late December passed legislation that altered the name of the Milk Commission of Ontario.

If I might, I would like to address a few of the technical aspects of this to clarify things such as the recommendation, and so on. I think some the questions that had been raised by Mr. Bell and by members of this Committee need to be addressed.

Then, secondly, very briefly what I would like to do, is to just comment on the three issues that Ms. Morrison spent a considerable amount of time on. I will not go into a lot of detail on that because I think some of the queries that were asked by this Committee will answer some of those problems.

First of all, I would like to preface my remarks by indicating what the position of the Milk Commission of Ontario is and what the position of Minister of Agriculture and Food is. That can be found on page 49 of the material that is before you. I am sorry, I am going to refer to page 49. I think it is maybe 52. Yes, it is page 52 and 53 of the material before you. That is the response of the Minister of Agriculture, and it is dated October 8, 1986, and it was sent to Dr. Hill.

Basically I think that in the third and fourth paragraphs there, it sums up quite accurately the basic premise that the Milk Commission of Ontario and the Minister of Agriculture and Food is working from. That is that the

Milk Commission, as a board to administer this fund, has a fiduciary duty to all of the processors and producers of milk in this province. Part of that fiduciary duty is one in which they have to act as a trustee of those funds.

So any of the decisions that they make, whether it amounts to 10 per cent of the claims that are filed since the Fund came into existence or not, are based on that basic premise.

Now, as I said, that is basic philosophy that I want to work from.

I would like to comment on whether this recommendation should have been addressed to the Ministry of Agriculture and Food or the Milk Commission of Ontario.

First of all, the Milk Commission of Ontario is a body corporate established under the Milk Act. The Milk Act in Section 3 -- now, of course, this has been amended by recent legislation, so we have to take that into account. All that has changed is the name. It is no longer the Milk Commission of Ontario, it is now called the Farm Products Marketing Commission. What happened was there was an amalgamation of the Farm Products Marketing Board and the Milk Commission of Ontario.

However, during the time of this complaint the Milk Commission of Ontario under Section 3(1) was continued and it was a body corporate responsible to the Minister.

Going from there we can see that the Farm Products Payments Act, the Regulation 391 indicates that the Board that administers the Fund in Section 2 and 3 is established, and in Section 3 it is the Milk Commission of Ontario that administers the Fund.

I would also like to refer to the documents that the Ombudsman's staff have provided you.

Page 49 of that material you will see a letter to Dr. Dan Hill dated May 20, 1986, that commences on page 48, and going over to page 49 I refer you to the penultimate paragraph.

"Finally, your conclusion states that the Ministry's decision not to pay _____ claims was unreasonable."

Madam Chairman: Hansard, delete the reference to the claimant. It says "decision not to pay" and then there a word, _____, delete that word, please.

Mr. Dombek: If I may apologize to the Committee.

Mr. Bell: We have our own fund around here, not to

consist of goat's milk, but cookies.

Mr. Dombek: I will ensure that some are obtained during the break, along with milk.

I must apologize to the Committee, and perhaps I can just explain my error there. Of course we have been dealing with this as dealing with human beings and real people, and now we are down to initials and initials that do not even refer to the actual people, and it is somewhat confusing.

So any ways, back to the penultimate paragraph.

"Finally, your conclusion states that the Ministry's decision not to pay _____ claims were unreasonable. It should be pointed out that the decision not to pay _____ was a decision of the Milk Commission of Ontario and not the the Ministry of Agriculture and Food."

Madam Chairman: Mr. Philip?

Mr. Philip: Well, we can play jurisdictional games, and we have played this with other agencies including the HUDAC home warranty program. I suppose that if the Travel Agent's Compensation Fund came here they might try the same thing.

The fact is that the negotiations were with you, whether the directions from the Ombudsman were sent directly to the Minister of Agriculture or not, you were aware that the direction was to you. So I am not impressed by any kind of argument that says some how she went to the wrong office.

Mr. Dombek: No question about it. All I am suggesting to you, Mr. Philip, is that when this Committee, if it decides to make a recommendation or something along that line, that they at least address it to the right party.

Madam Chairman: Could you tell us who that party is?

Mr. Dombek: The Milk Commission of Ontario. Sorry, it will be the Farm Products Marketing Commission.

Mr. Bell: I think what you are saying is that in the event that the Committee decided to support the Ombudsman's recommendation, the Ministry and the Commission would prefer a recommendation to be read in that way?

Mr. Dombek: That is correct.

Madam Chairman: Thank you. That has been very helpful.

Mr. Philip: I am fine with that. I thought in reading your letter of May 20, that you were trying to flip it off on a technicality. If that is not your intent, I am sorry.

Mr. Dombek: No. If I may say, Mr. Philip, the Ministry of Agriculture and Food, and I think that could be substantiated by Ms. Morrison, we have always tried to cooperate, and I want to address a second issue.

But in any event, I think as Mr. Bell has quite correctly pointed out, that is the position as to any possible recommendation.

Now, I would just like to comment. Mr. Philip made a comment and the Ombudsman made a comment as to the lateness of the January 19th reply. We agree, that reply was late, and we apologize to the Ombudsman for that.

I should point out that that was not a reply to a Section 19(3) letter. That was request for further information.

The Section 19(3) letter had preceded this by some considerable amount of time, and what we were doing was we were trying to obtain some additional information in order, if possible, to settle this.

In fact, if I can refer you to the first page of that letter, about midway down, on the January 19th letter, that was some of the material that was handed out, Dr. Collin, the Assistant Deputy Minister of Marketing and Standards, says:

"I apologize for the delay in replying to your letter, but my review to respond to these issues has taken into account files of both Farm Products Marketing and Dairy Inspection branches, and interviews of the staff responsible for the licensing of_____."

Mr. Bell: Delete that again.

Mr. Dombek: I am going to have to beg the Committee's indulgence. Again, I apologize.

Madam Chairman: Are you going to be referring to this letter very often? We could certainly provide you a copy, our copy which has been sensed, if you will.

Mr. Dombek: I may have one.

Madam Chairman: Make sure you have one and then that will assist you, because I have the feeling that each of us is going to have a cookie by the end of this presentation. Thank you very much.

Mr. Dombek: So in that respect, I just wanted to clarify that one particular point because I did not want it to be taken as a -- I hope that the Committee would realize that we do deal with the Ombudsman's complaints seriously, on this and many other matters. We have had many meetings

with the staff of the Ombudsman and we do treat their complaints with the greatest respect.

When we feel that we do require further time, I think Ms. Morrison can verify this, we do write to them and we do ask for additional time if necessary.

Those are just two sort of minor matters, and I agree with you, that they are minor as to some of the items that were raised, I guess preliminary matters by both Dr. Hill and Ms. Morrison.

I would agree with Mr. Bell in his interpretation, I think, of Section 7(3) of Ontario Regulation 391. That is the section that says:

"An application in Form 1 shall not be made later than the 30th day next following the date on which, (a) the payment in respect of which the application is made became due; or (b) the whole or any part of the dealer's assets has been placed in the hands of a trustee for distribution under the Bankruptcy Act."

I think that quite clearly we have been dealing with this as a matter under Section 7(3)(a) and not as a matter under 7(3)(b), simply due to the fact that the facts, as Ms. Morrison presented, would indicate that the bankruptcy of the processor occurred much later.

Madam Chairman: Mr. Bell?

Mr. Bell: What does that mean then? We know the processor now has gone bankrupt. What do you say it changes?

Mr. Dombek: It doesn't change anything.

Mr. Bell: Why?

Mr. Dombek: Because when the original claims were made by the complainants, they were making their claims under 7(3)(a).

Mr. Bell: Well, I think, with respect, they were making their claims under 7(1).

Mr. Dombek: Yes. But I think 7(3)(a) applied in that particular circumstance. The processor at that time was not in bankruptcy.

Mr. Bell: Okay. But why cannot a subsequent act of bankruptcy extend everybody's filing period?

Mr. Dombek: I do not think that that is the intent of

the Regulation. The Regulation is meant to cover two situations; one, where a processor would go bankrupt and as a result of that could not make any payments, and has filed for bankruptcy, and then of course 7(3)(b) would apply. That is the way I think the Milk Commission would interpret that.

Mr. Bell: How is that different in this case? Because it was always available to the processor to make these payments even after the application was made.

Mr. Dombek: That is right, it was. But the processor did not, and that is the crux of the matter. If the processor had, for example, stopped processing but continued to make the payments, or had continued to process and make the payments and then had gone bankrupt, then 7(3)(b) would come into existence.

Mr. Bell: Let us just test it. Let us assume that none of the four had filed their applications on the day indicated and none had filed the applications on the date of the bankruptcy, either the petition or the assignment, do we agree that in that event 7(3)(b) would serve to revive, if you will, a filing date that had previously expired by 7(3)(a)?

Mr. Dombek: No, I don't think that 7(3)(b) is regarded as reviving it.

Mr. Bell: Bad word, bad word. But you would agree that whereas the 7(3)(a) filing date had expired, there was a new filing date created by the act of bankruptcy?

Mr. Dombek: That is correct. And if other applicants to the Fund had filed using 7(3)(b), because of the fact of the bankruptcy, then that would have been fine.

However, to the best of our knowledge, we are not certain that the processor in this particular case ever did finish off and go bankrupt.

Mr. Bell: Well, I thought you said he did.

Mr. Dombek: I think that was raised by the staff of the Ombudsman.

Mr. Bell: I thought you nodded your head.

Mr. Dombek: The individual that was running the processor filed for and I believe went bankrupt.

Mr. Bell: But you are not sure if the corporation did?

Mr. Dombek: The processing corporation, right.

Mr. Bell: My information is that the charter dissolved

in June of 1985.

Madam Chairman: Mr. Johnson?

Mr. Johnson: How many things were filed by the producers against this processor?

Mr. Dombek: Twelve.

Mr. Johnson: Twelve. Four were rejected and --

Mr. Dombek: All twelve were rejected for various reasons.

Mr. Johnson: All twelve?

Mr. Dombek: Yes.

Mr. Johnson: So there was no claims paid against it?

Mr. Dombek: That is correct.

Madam Chairman: Mr. Philip?

Mr. Philip: Those whom you say then are covered under or would have been covered if they had met the time frame under 3(a) were not covered, is it your understanding then, now that we have ascertained, I believe, that there was a bankruptcy filed, that any one of those would have been covered under 3(b) if they had refiled?

Mr. Dombek: No, I think what we have ascertained is that in this instance, the facts are that the individual that was running the processing plant filed a personal bankruptcy and not a bankruptcy on behalf of the processing agent. I think that information that Mr. Bell has that the articles of dissolution of the processor came about in 1985.

Mr. Lupusella: I have a question. My question is in relation to the dissolution of the corporation. What I don't understand is the reason why the Ministry of Agriculture and Food, or the Ministry of Milk--

Mr. Dombek: Milk Commission.

Mr. Lupusella: --Milk Commission, refused to accept even the claims which had been filed on time?

Mr. Dombek: For various reasons. I think that has been related somewhat by Ms. Morrison. Where someone did file on time, if they could have given sufficient documentary evidence to approve their claim, then the Milk Commission would have looked at those documents. I plan to get into that later on.

Mr. Lupusella: So one of the main reasons was, for example, in this case, neither the records of the producers nor the records of the processor could meet the test since the number of cans of milk received did not accurately reflect the amount of milk contained in those cans. Is this one of the reasons?

Mr. Dombek: That would be one of the reasons.

Mr. Lupusella: Now, if this is the case, why on page 2,, again on the document presented before us by Ministry of Agriculture and Food, the Commission did not accept, for example, on Section i, the last paragraph:

"This study of records also indicated that the processor estimated weights on the heavy side. When several of these bulk milk shippers quit the processor and started shipping to another plant, they had much lower shipping weights than they had at the processor."

So why did the Commission not take into consideration the less weight in question?

Mr. Dombek: Just to clarify, you are suggesting, I think, Mr. Lupusella, that the Commission should have looked at the milk that was delivered to subsequent processors and used those records?

Mr. Lupusella: Exactly.

Mr. Dombek: I think that would have been in breach of that fiduciary duty that the Commission has towards the Fund. The reason for that is that producers are only eligible for the milk that has actually been shipped to the processor that has failed to pay them. As such, to use subsequent records to justify or verify the amount of milk shipped would not be fair to the Fund, which is -- of course, you have to remember, the Fund is not government monies; it is a fund of private sector monies that comes in from some processors and all producers in the province.

Mr. Lupusella: Did the Commission have problems to accept the evidence that milk was not shipped?

Mr. Dombek: Pardon me?

Mr. Lupusella: Did the Commission have problems to accept the premise that the milk was not shipped to the processor?

Mr. Dombek: I think the Commission had some problems with that for the month of September.

Mr. Lupusella: Just for one month?

Mr. Dombek: That is right.

Mr. Lupusella: What about the remaining months in question?

Mr. Dombek: We think that the milk was shipped but the Milk Commission's position is that the records are so feeble and unreliable that it is impossible to ascertain the amount that was actually shipped.

Mr. Lupusella: Okay? Thank you.

Madam Chairman: Mr. Carrothers?

Mr. Carrothers: I just wanted to get back to 7(3) for a second.

You seem to determine that the company may not have gone bankrupt, but just kind of expired. What happened to its assets?

Section 7(3) also refers to the Bulk Sales Act. Was there a disposition of its assets under that Act, do you know?

Mr. Dombek: I could not tell you.

Mr. Carrothers: It must have something that was sold.

Mr. Dombek: We do not have that information.

Mr. Philip: How can say that that section does not apply since there is an "or" in there?

Mr. Dombek: Because of the fact that the company went into either voluntary dissolution or was dissolved by the company's branch in 1985.

Mr. Philip: But you are just saying that you do not know whether the company was covered under the Bulk Sales Act.

Mr. Dombek: Well, we know that the company was not placed in the hands of the trustee.

Mr. Elliot: Can I make a point of order, please?

Madam Chairman: Yes, Mr. Elliot.

Mr. Elliot: I think for the record to be correct, that people should be addressing their questions through the chair, because I notice the heads of the Hansard bobbing over there. There was several comments injected here that were not recognized by the chair. I do not think that is a good idea.

Madam Chairman: Thank you, Mr. Elliot.

Mr. Philip, will you make your point about the Bulk Sales Act?

Mr. Philip: May I ask a supplementary then?

Madam Chairman: Is it a supplementary on a point? We have a few people in line.

Mr. Philip: It was a supplementary on that point.

Madam Chairman: You will have to ask Mr. McLean first.

Mr. Philip: Mr. McLean, may I ask a supplementary on your point?

Mr. McLean: Go ahead.

Madam Chairman: There, Mr. Philip.

Mr. Philip: The operative word under Section 7(3)(b) is "or". Now, did I understand you correctly to say that you do not know, you are convinced that they were not covered under the Bankruptcy Act because it was individual bankruptcy, but that you do not know whether it was covered under the Bulk Sales Act?

Mr. Dombek: Well, there would have to be a trustee, Mr. Philip, put in to sell the assets under the Bulk Sales Act, and that knowledge would have come to our attention if that occurred, and it certainly did not occur.

Mr. Philip: Okay.

Madam Chairman: Mr. McLean?

Mr. McLean: Thank you. This Regulation 391, is that what all producers in Ontario are regulated by?

Mr. Dombek: All milk producers, yes.

Mr. McLean: And shippers?

Mr. Dombek: Yes.

Mr. McLean: Okay. On page 3 of the handout we got today, second paragraph under Application of Claim Period:

"All milk producers in Ontario paid monthly. Payment for the previous month's milk is due on the 1st of every month, and payment has to be made on or before the 15th."

I see a problem here with this, they were not always paid by the 15th and there was some other problems.

The writer of this letter, is he indicating that all producers have to be paid by the 15th of the month?

Mr. Dombek: No. I think perhaps it is a poor choice of words. My understanding is, and I stand to be corrected by Mr. Knox, that it depends on the shipping and payment arrangements that each company has with its producers. Is that correct?

So in this particular case, the payments would have been due at the beginning of the month. After you shipped your milk for say the month of August, at the end of August you would have been due -- your payment for that month's shipments would have been due.

Mr. McLean: What you are saying here is that it must be paid on or before the 15th?

Mr. Dombek: That is right.

Mr. McLean: What you are saying, the fact was that they were late in filing their claim because they did not get paid on the 15th, so therefore they were not aware that they were behind.

Mr. Dombek: If I can refer you to some of the documents, such as the document that was provided by the Ombudsman's office on the claims on the Fund for Milk and Cream Producers, it was in the material handed out today. It is this document here.

What our position would be is if these claims were filed in time, that payments for the month of June, for example, in Mr. and Mrs. J's case, would not be eligible, because it would certainly be outside of the time limit.

What we are saying is that if there was eligibility in Mr. and Mrs. J's case, that it would be for the milk they shipped in the month of August, because they filed their claim on the September the 16th.

Mr. McLean: Well, in 1983, and Mr. Philip referred to it earlier on, the Dairy Inspection branch sent out copies of Regulation 391 to every producer, I presume, in the province. That must have been an indication that there is a lot of producers that had no idea what Regulation 391 would be.

Mr. Dombek: Perhaps I can give you a little bit of historical background again. You will have to bear with me, I may need some assistance from Mr. Knox or one of the other officials from the Milk Commission here.

The Milk Fund had been in existence for sometime, and basically it was dealing with milk from cows. The goat

industry then became sort of a novel kind of occurrence. There probably were some producer of goat's milk that were probably unaware of the sophisticated nature of how milk is bought and sold in this province.

As members are probably aware, milk is sold to the Milk Marketing Board, and so on.

So there was this new group of people that felt that there was a niche in the consumer market for goat's milk, and so they were sort of getting off the ground, and there may have been a little bit of -- well, there may have been some lack of knowledge compared to say a dairy farmer that had been in production for a number of years.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Just referring to this handout again, Ms. N, her claim October 28th, in July, 345; in August, 377; September, 311. So really there is not much difference between the full month of July, the full month of August and the month of September. Yet in September I thought the company folded, September 8th.

Mr. Dombek: Yes, this interesting because the claims - and this is part of the problem about verifying these claims - when officials from the Dairy Inspection branch did an inspection of the processor on September 9th, the processor was no longer there. He wasn't processing any milk. So for a period of eight days, Mr. and Mrs. J and Ms. N produced a fairly considerably amount of goat's milk. Sorry, Mr. and Mrs. O.

Mr. McLean: Well, just in reference to Ms. N, the amount of shipped was nearly as much as the whole month of July and August.

Mr. Dombek: That is correct. That was part of the difficulty, I think, that officials had in trying to justify that kind of claim.

Mr. McLean: Madam Chairman, I was not finished the questions I had.

Madam Chairman: Mr. McLean?

Mr. McLean: It is not clear to me yet, when the Regulation 391 puts the deadline on to people that want to make a claim, and I find that difficult to accept when a lot of producers are not paid on the 15th. I think that would be true in you saying that, would it not, that a lot of producers in the Province of Ontario are not paid by the 15th? I am speaking to the Regulation 391.

Mr. Dombek: I think payments are very prompt. The way

the system works, particularly with cow's milk, is that if a processor does not make a payment on time, they have to make their payment to the Milk Marketing Board which then makes its payment to the individual producer. So if I am a dairy farmer, I sell my milk to Milk Marketing Board, who then sell it to various processors, whoever they may be.

Consequently, if the Milk Marketing Board does not receive payment, it can then make a claim on the Fund.

The other method that the Milk Marketing Board has is to insist that processors pay for their milk COD, cash on delivery. If they feel that there may be some problem with the individual processor, they can demand payment for the milk right up front. So there is a substantial difference in that respect.

Mr. McLean: I find it hard to accept that the farmers, because they go over their 15th deadline and file, they have less time to file because they do not know whether they are going to get paid on the 15th or 16th, 18th, 20th. Then if they do not get their cheque on the 20th then they are going to say, well, I have got to file, and not knowing the rules and regulations they could be far over the deadline.

From what I am gathering here, this is only part of the basis that you are denying the claim.

Mr. Dombek: That is right, it is only part.

Mr. McLean: That is right. But to me it is a very important part.

Mr. Dombek: I think, as Ms. Morrison quite correctly pointed out, Mr. McLean, there is discretion on the part of the Milk Commission to extend that time frame.

Let me give you an example. Let us say that a producer was out of the country at the time the processor went bankrupt or failed to make his payment, producers do leave the country, they may go south, or whatever it may be. If he or she came back and realized that they had not received that payment when it was due, then the Farm Products Marketing Commission can take that into account. So there is discretion there.

Mr. McLean: It would not surprise you, to let you know, that most of the producers are not paid until the 19th at the earliest and lots of them on the 20th, or later of the month?

Mr. Knox: If I might respond to that?

Madam Chairman: Just make sure that you do so to the microphone.

Mr. McLean, when we are being serenaded by this, we need a little bit higher volume, sorry. Thank you very much.

Mr. Knox?

Mr. Knox: Thank you. The comment Mr. McLean makes which is when farmers receive payment for milk, and he is suggesting that would we agree that it might be the 19th or 20th.

The situation of cow's milk where the Milk Marketing Board sends out the cheques to the farmers, they place those cheques in the mail on the 15th. The farmers have an option of asking the Milk Board to put directly in their bank accounts the cheque, in which, I would submit, they would have their monies by the 16th. But in the cases where the farmer chooses to have it mailed to him, it in fact may be the 19th or so before they get their cheque.

If the Milk Board is aware of any major concern in the postal system, they have reverted to sending out those cheques with the milk transporters to ensure that the farmers get those before the end of the month.

Mr. McLean: Then would you take it upon yourself to investigate and make sure that those direct ones are in the bank by the 16th of the month?

I just happened to have been in the business for 28 years, and they are not deposited until the 21st of the month. So maybe in your new role as Chairman, you should check into the rules and regulations, how you are treating your dairy farmers.

Mr. Knox: I would glad to do that, sir.

Madam Chairman: Mr. Bell?

Mr. Bell: This is just to clarify. The question of the due date is something this Committee is going to have to wrestle with and decide.

Either or both of you gentlemen, Collins' letter January 19, page 3, speaks to something called a standard procedure used as due date for payment of milk.

Now, I want to understand for the Committee, you are not saying that the due date you describe in this part of the letter is the only due date that the legislation or the regulation contemplates, are you?

Mr. Knox: I am sorry, I am not familiar with the letter.

Mr. Dombek: I think if I can maybe explain. Mr. Bell

is right here. I think what he is saying is that what is described on page 3 of Dr. Collins' January 19th letter is only one circumstance. That there may be other circumstances for payments. It is just that the industry seems to follow this rule, and other payment dates are exceptions.

Is that it?

Mr. Bell: First of all, the regulation contemplates and permits, I suggest to you, more than one due date. You are nodding your head yes.

Mr. Dombek: Yes.

Mr. Bell: And due dates in addition to the one you describe on page 3 of Collin's letter.

Mr. Dombek: Yes.

Mr. Bell: For example, you used the COD matters. If one were on a COD basis with a processor, on the 3rd of February when a supply of milk was delivered, there would be a payment for that day.

Mr. Dombek: That is right.

Mr. Bell: And the due date would be February the 3rd.

Mr. Dombek: That is correct.

Mr. Bell: In that case that person has got a telescoped limitation time under this legislation.

Mr. Dombek: Yes, but the basic rule still applies.

Mr. Bell: Thirty days.

Mr. Dombek: That is right.

Mr. Bell: However, if there is, as is described in this case, perfectly appropriate arrangement for payment on the 15th day of the month following the delivery, the month of delivery, then the 30-day period is on the 15th day of the month following that, if you are with me.

Mr. Knox: I am not following you.

Mr. Dombek: Sorry.

Mr. Bell: Take an example, for milk supplied in June, if the terms of payment between the processor and the supplier were payment on the 15th day of July, the day for filing the application under Section 7 would be on or before the 15th or the 14th day of August?

Mr. Knox: That is the discrepancy. We are saying the date for forwarding claims is 30 days after the time that the payment is due.

Mr. Bell: That is what we were talking about for the last three minutes. There can be different due dates, depending on the terms of the relationship between the processor and the supplier.

Mr. Dombek: That is right.

Mr. Bell: You would like to have it as you describe in 3, applied universally across the province, and we can all understand the reason.

Mr. Dombek: That is correct. In this case the Milk Commission determined that the due date for this particular processor was the first day of the next month. So that the 15th - I am reading from some notes given to me - the 15th is the payment period, not to be confused with the actual due date.

Mr. Bell: I guess I do not understand how the Commission imposes its designation of what the due date is on this arrangement.

Mr. Dombek: Perhaps if there is still some confusion about this I could ask Mr. Alles, David Alles, who is the vice-chairman of the Commission, he knows a little bit more about this particular aspect.

Madam Chairman: Mr. Alles, if you can shed some light on our 15 day discrepancy and the due date versus the payment day, we would appreciate it.

Mr. Alles: In this particular situation with this processor, we were informed that producers received payment on the 15th, and that is the same as it is with our milk producers, payment is due on the 15th of the month. So we determined, they deliver the milk through the month, the payment becomes due, the due date is the 1st day of the next month. The 15th is the payment period. That works the same as it is with milk, cow's milk.

So the Commission, when dealing with this case at that particular time, determined that the due date -- because the processor was paying the same payment period as with cow's milk, we determined that the due date was the 1st day of the next month, and 30 days from there is the time period that the producers had to claim on the Fund.

Mr. Bell: But what if the people that were part of the supply situation here, the four complainants, what if they said the due date was the 15th of the following month?

I know what you have determined, but what if they said, no, it was the 15th of the month following the month of supply?

Mr. Alles: Well, we dealt with this the same as we deal with other processors of milk, and we felt the payment period was no different than cow milk, so the Commission of the day determined there was no reason to determine any differently. Their payment, the cheques were issued supposedly on the 15th. So we did not view that as any different from any other -- the way the OMMB works.

Mr. Bell: One last question. What is the difference in your mind between the due date and the payment date?

Mr. Alles: That is payment period, terms of payment. If I have a bill and it becomes due on the 1st of the month, my payment period may be the 15th. I work that way with my utility bills.

Mr. Bell: Okay.

Madam Chairman: Mr. Bossy, on this point?

Mr. Bossy: No.

Madam Chairman: Not on this point? Two people on this point, then I will get to you, Mr. Bossy.

Mr. Bossy: I wanted to go to the inadequate records.

Madam Chairman: Let us just finish off with this.

Mr. Charlton?

Mr. Charlton: I want to follow up on Mr. Bell's questions to you about the regulations.

It seems to me in reading this regulation, as compared to any other piece of legislation that I have ever read, that 7(3) was intended to give farmers 30 days in which to file a claim from the point at which they become aware that they have not been paid. You say that is a fair interpretation of this section?

Mr. Dombek: Yes. If you consider that they become aware that they have not been paid on the date that the payment is due.

Mr. Charlton: No. That is why we are having problems with your determination of what due date is. If the processor does not have to have the cheque in their hand, this so-called payment period you keep talking about, until the 15th, the 15th is the first possible day on which they can become aware that they have not been paid. Now, if the

regulation was intended to give them 30 days from that point in which to file a claim, then the due date cannot can be the 1st, it has to be the 15th.

Now, either they were intended to have 30 days to file a claim or they were only intended to have 15. That is what you have got to tell us.

Mr. Dombek: Perhaps an example. If I can just have a second, I just want to make sure that I have got this example correct.

Mr. Charlton, if I deliver milk up to and including August 30th, then the payment is due on September 1st, all right? And that is the due date. I then have 30 days from that date in which to file an application for a claim against the Fund.

Now, because of the process, because of the way the industry works, there are payment periods of 15 days, for example. So, in essence, there is a period of time, unless I am receiving cash on delivery or something along that line, between the 1st of September and September 15th, when I may not have realized that the processor was going to not pay.

Mr. Charlton: That doesn't satisfy my question.

My question, first of all, was, was the farmer intended to have 30 days after realizing that he or she had not been paid in which to file a claim? Your response to that with was yes.

My second question was, if the processor is not required to pay until the 15th, the only way that you can have a 30-day period in which to file a claim upon knowledge that you have not been paid is to count the 15th as the due date. You cannot have it both ways.

Either they have got 30 days in which to file a claim from the point at which they become aware that they have not been paid. You cannot file a claim between the 1st and 15th if the cheque is not due until the 15th.

Mr. Dombek: Well, there are different situations.

Mr. Charlton: That is right, and that is exactly what we are saying. We do not have a uniform situation.

So if have got an agreement which says that the processor does not have to hand you the cheque until the 15th of the following month, then that is the first day on which you can become aware that you have not been paid.

I am saying to you, that as I read the regulations, the

regulations are intended to give the producer 30 days upon knowledge that he has not been paid in which to file a claim.

Mr. Dombek: I think that, Mr. Charlton, with the greatest respect, that that is not the interpretation that the industry puts on it, and it depends on the particular situation.

Let us take a cash on delivery situation, which the Milk Board does have, and it would be possibly the biggest claimant on the Fund if there was ever a failure. With the situation where there was cash on delivery and if payment was not made, that payment has to be made on that particular date.

Mr. Charlton: That is right. So that that producer gets 30 days from the time he becomes aware that he has not been paid, not from when --

Mr. Dombek: That becomes the due date.

Mr. Charlton: That is right. The day that he is required to receive payment is the due date, not any other date.

Mr. Dombek: No, I think that there is some confusion here between what is the due date for the payment and what is the period of time that the industry has allowed processors to --

Mr. Charlton: You have not answered my question yet about how somebody can file a claim before they become aware that they have not been paid.

Madam Chairman: Mr. Charlton, on point of order.

Mr. Bossy?

Mr. Bossy: On a point of order. I would like to ask the chair if we could recess for lunch, because it is creating more questions, and we will be coming back at 2:00 anyway. I would like to move that we adjourn for lunch.

Madam Chairman: I have a point of order before your adjournment.

I just wanted a correction, and perhaps we can ask Hansard to look this up for us, if it is Mr. Dombek's desire, but Mr. Charlton referred to a question and to your answer. The question was, do the processors have 30 days from the due date or from the day of payment, and Mr. Charlton said the answer of Mr. Dombek was that it was 30 days from --

Mr. Charlton: No, my question was: Does the regulation intend that producers have 30 days from the time they become aware that they have not been paid in which to file a claim. That was my question.

Madam Chairman: That is right. But then you referred to Mr. Dombek's answer and said that his answer was that it was 30 days from the payment date. I recollect Mr. Dombek's answer being it is 30 days from the payment date or the due date.

Mr. Charlton: No. That was the answer to my second question. My first question was, did the regulation intend that they had 30 days from when they became aware, and the response to that was yes.

Mr. Dombek: No. Well, since we have got that nice and clear, I can say that the response is no.

Madam Chairman: Yes, and that is how I understood your answer. So as long as that clarification has been made.

For those that have two supplementary questions on this point, which is the due date, which is Mr. Elliot and Mr. McLean, would you accept an adjournment at this time?

Mr. McLean: Yes.

Madam Chairman: Is that acceptable?

We are going to adjourn at this time, and just if you could give me a moment.

I have been informed that we have not quite determined where this noise is coming from, and that it is going to persist for the afternoon, and that the only other room available will be noisier than the room we are in. So I cannot suggest an alternative location for our meeting. So let us assume that we are resuming here at two o'clock, and if there is any other different modification, we will make that judgment at that time.

Mr. Philip: With respect, the first responsibility of this building then is to deal with the Legislature, not with any other matter, and I think that if we cannot get rid of this noise, that the Chairman should approach the Speaker and demand that it be stopped.

Madam Chairman: Well, I assure you that I will be endeavouring in the next hour and 24 minutes to cease the noise.

Mr. Philip: I can't hear Mr. Bossy, dealing with this noise right behind by my head. I am going to have to sit over there instead of here.

Madam Chairman: It is adjourned until two o'clock in this room.

Luncheon recess at 12:36 p.m.

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

TUESDAY, JANUARY 26, 1988

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Johnson, Jack (Wellington PC) for Mr. Pollock
Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd
Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Ministry of Agriculture and Food:
Dombek, Carl F., Director, Legal Services
Beckley, Steve, Administrator, Fund for Milk and Cream

From the Farm Products Marketing Commission:
Knox, Ken, Chairman

From the Office of the Ombudsman:
Morrison, Gail, Director, Investigations
Lee, Dr. Allan, Investigator

ERRATUM: In this transcript, Mr. Morrin should be Mr. Morin.

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday, January 26, 1988

The committee resumed at 2:00 p.m. in committee room 228.

Madam Chairman: We would like to resume if we may, and hopefully we won't have the the serenade that we had downstairs. What I would like to suggest to the Committee members is that we allow Mr. Dombek an opportunity to make his -- finish his summary introductory remarks. He had only addressed one -- the jurisdiction and due date portions of his remarks. He has assured me that he could do that in not too many minutes and if you could jot down any questions that you might have during that presentation, I think that we can get a clear synopsis and we can permit questions and so forth from then on, if that is acceptable?

Mr. Lupusella: The other point that I would like to raise is, so that it is fair to the members of this Committee and the party which is making this representation, is that when the question is asked we give an opportunity to the party to answer the question and then the note to intervene with another question and another question and so on. I don't think it is proper for this Committee to --

Madam Chairman: I agree. We won't be spurred on by the noise and by the lateness of the hour. So if you would proceed, Mr. Dombek, we would appreciate that and if questions could be held just until the end of this presentation then we will have equal opportunity to ask questions at that time.

Mr. Dombek: Thank you very much, Madam Chairperson. I would like to go on from where I was. If you recall, I was talking, and again I just want to reemphasize, just what the philosophy is behind the Milk Commission in dealing with the judiciary duty that it owes to the Milk Fund.

I think that we pretty well canvassed section 7(3)(viii) of the Regulation. I would like to just point out to Mr. Philips and to other members of the Committee, there was a question as to what types of records are required by the processor in the milk and in the goat industry.

Regulation 250/87, which is a new regulation but it repeals regulation 629/80 which was in effect at the time of this particular problem, was and indeed contains a complete documentation of all the records that processors require. And I will just, I won't refer to this section but it does refer to the fact that a processor shall keep records and volumes of note received and so on and so forth. And I will just refer you to section 118 and onward in your

deliberations and findings, if necessary, for you to look at.

Basically, I think I can now move on, I think we have canvassed the preliminary matters and I think I could move on to the three substantial areas why these claims were denied. I don't think, unless there are further questions on it, I don't plan to talk about the late applications unless there are further questions afterwards. So I will move on from there.

We agree that the commission has a discretion in late filing. I think we gave you an example this morning of a situation where an application would be allowed when the producer was away, out of the country, or for some other reason may not have realized that the payment was not forthcoming. And so the discretion is there, in the regulation.

I would like to move on to the second area and that is in relation to the arrangements that existed between the processor and the complainants.

With the greatest of respect to Ms. Morrison, I think that we have to look at the bulk of all these problems. Not to take them out singly and reduce them to nothing but to add them up and to see what weight we can give to them. And I think that we, if we do that, we can see that the circumstantial evidence, if you will, is sufficiently weighty that it does point to an arrangement between the processor and the producers.

I believe it was Mr. Johnson, this morning, who indicated or queried whether there was any loan arrangements and he was a little suprised that the complainants could not be very specific as to the amount of the loan. But yet here were loans given to the processor and obviously that particular complainant probably had some inside knowledge of the operations of that processor.

Similarly, the other complainants, as indicated, either worked or while worked for free or worked at a minimal amount of money for the processor and they were aware and there were times when they did not have or did not receive their payments and they continued to let them defer.

So while I was quoted this morning by Ms. Morrison, as giving an opinion as to what is an arrangement, I think if you look very carefully, you will see that what I was saying is that one of the purposes of that particular section in the regulation is to look at that type of situation where there may be speculation on the futures market. And Ms. Morrison had some difficulty in saying that sometimes you can't see how some people make money in the furtures market. And I have never gotten into it myself simply because I know

I probably wouldn't make any money on it. But it is certain -- we know it is there and that some people do speculate, they receive a set price, they are taking the chance that the price of the product will go up and for those of you familiar with, for example, the grain industry in corn, soy beans, that occurs quite frequently.

So I think the definition and the reason that there is not a definition of arrangement that is in the regulation is to carry on a very broad type of situation so that we can look at the broad aspects of the types of arrangements that go on. I think again when you take a look at Dr. Collins' letter of January 19th, which was given to you this morning, and particularly at page 4, to the end, I would suggest that the weight of it, not necessarily individual components of it, but the entirety would suggest to you that there was some sort of arrangement.

Finally, I would like to go on to the, I remember, I think it is interesting, I think it was Mr. Bossy who used the word or phrase that there were these side deals that the producers had and I think that is exactly what exactly is that we were saying.

Now, I would like to just comment on pages, I would like to go on and comment as to the types of documents or the lack of sufficient documentation because I think really this is getting to the crux of the whole matter.

First of all, I would like to refer you to pages 66 and 67 of the material that was handed out by the Ombudsman and quite correctly, it was indicated that these were documents that came from the Ministry of Agriculture and Foods, or actually from the Milk Commission files. However, I would like to refer you to the January 19th, 1988 letter, again from Dr. Collins to the Ombudsman's office. And if you look at the bottom of page 1 where there is a heading called "records of delivery" and from there, going on to Page 2, and the top of page 3, Dr. Collins indicates why those records were not sufficient.

Basically, and I am not going to read that for you because you have it in front of you and you can read it at your leisure, but basically that was unsubstantiated information that was given to the Milk Commission by the complainants. There was no way of verifying those amounts found at Page 66 and 67.

Mr. Philip: Can I ask a question?

Madam Chairman: Yes.

Mr. Philip: Thank you, Madam Chairman.

Madam Chairman: If you would complete your opening

remarks.

Mr. Dombek: Thank you. Now, as to the fact that the processor had records, the Dairy Inspection Branch, through its auditor, tried to obtain those records and he was repulsed by the owner of the processing plant with a weapon and some large dogs. And again that was shared with the Ombudsman, the fact that we claim that these are overestimates of the milk by the processor. After the processor declared personal bankruptcy there was no reason for him to lowball these figures.

So I think we have to be somewhat suspect of them. And consequently, I think that when we take a look at the bulk, again, when we look at the bulk of it, not just one matter as pointed out and tearing it apart.

Yes, it is circumstantial, yes, it is -- there have been explanations, but when you look at the whole amount of all this evidence, I think it can only lead to one conclusion and that is there wasn't enough information for the Milk Commission to make that recommendation, to pay.

Now, I would like to just conclude by saying just one or two small items. First of all, this matter was reviewed by the Milk Commission not only once in 1982 but it was again reviewed in 1985. And again, with the information that the Ombudsman supplied, the Milk Commission held a meeting and looked at it and reviewed its decision and again it came to the same conclusion.

There were opportunities given to some of the producers to appear before the Milk Commission and to provide information or documents that were available and unfortunately these were not forthcoming.

I would like to refer to the Minister of Agriculture and Foods' letter, again, if I could. And that is found at page 53 of your notes. And I think I will try and be very careful but I think that I will try and read this because I think it is very important. This is on page 53 and it is the second complete paragraph beginning "as a farmer". As you are probably aware, Mr. Riddell was a farmer:

"As a farmer, I am acutely aware of the need for producers to keep records for business purposes. Not only are records necessary for possible claims for financial assistance from government agencies or for tax purposes but they are also necessary to evaluate the possibility of the farm.

I am advised that in this instance that the producers could not provide the minimum number of records which would verify claim. I would suggest to you that if the Milk Commission of Ontario had honored

the claims, that it would have breached its legal fiduciary duty which it owed to the other producers and processors. Even if the Milk Commission had some responsibility to insure that the processor kept proper records, the fact there was an alleged omission on its part, cannot by itself validate these particular claims. Surely when an individual decides to make a claim for compensation from that Fund there is required by that person to substantiate his claim with the proper documentation."

Members of the Committee, Madam Chairman, I would like to just conclude by saying something as an analogy here. I think that if you have a claim against your insurance company for a loss that you have sustained, whether it was a loss of a camera on a trip or a loss of a bicycle through theft or whatever reason, that you would have to prove to that insurance company the amount of that bicycle or the amount of that camera. That is all that the Milk Commission was asking. What the Milk Fund is in essence is an insurance claim. It is very analogous to that, and I would suggest to you that the decision taken by the Milk Commission was fair and just. Thank you.

Madam Chairman: Mr. Bell.

Mr. Bell: Can we take the issues one at a time, the three issues that are the reasons for the refusal of the claim. And before I start, can we take a little inventory across the four complainants in relation to the three grounds. And if we assume for the moment that the Committee's deliberation and decision is along the three grounds, that the Committee is going to have to agree with the Ombudsman in respect of his conclusions vis-a-vis discretion under the regulation extending for filing the application, for all four of them.

Now, let me be rhetorical. There are some claims for some of the months that the Ministry agrees were filed in a timely fashion and I refer you to page 3 of the January 19th letter, dealing with J and you have got A and B, I can't relate A and B to the four complainants. The last paragraph on page 3, there are amounts mentioned?

Mr. Dombek: Yes.

Mr. Bell: Right, we take that, first of all, you are going to have to help us identify the second amount to the, to one of the complainants.

Mr. Dombek: Yes, I have got Mr. A, I believe is the individual that is not a complainant.

Mr. Bell: So that amount is academic?

Mr. Dombek: That's right.

Mr. Bell: So in respect, therefore, to the four complainants, in relation to the timing issue of application, the Ministry on its interpretation of the due date, agrees that the August or the amount in question was filed on time?

Mr. Dombek: That is correct. Now, that is not agreeing that the amount claimed is verified.

Mr. Bell: No, no, because the other grounds pertaining to J now, is arrangement?

Mr. Dombek: That is right.

Mr. Bell: You don't say about J, your records were inadequate?

Mr. Dombek: Yes, we do.

Mr. Bell: Well then, I thought I understood what the grounds were this morning and I guess I don't. I thought you agreed basically with the Ombudsman's claims summary that we were given this morning which sets out not only the amount and timing of the applications but the grounds upon which they were turned down by the commission. And that also cross-references to page 41 of the material, the Ombudsman's report, where he summarizes on the bottom of that page, the three grounds and to whom they apply?

Mr. Dombek: Page 41?

Mr. Bell: Yes.

Mr. Dombek: Well, let's put it this way. Let me explain this very carefully, Mr. Bell, because almost all the claims and I am now looking at a document that was given to you by the Ombudsman on the entire claim on the Fund for Milk and Cream Producers, it is this document that points out all the amounts.

If we take a look, our position is this, that for certain of those claims, that the applicants were out of time. For example, Mr. and Mrs. J when they put in their application for June, which was put in in September, that they were clearly out of the time. So that is -- did you want to stop me there or?

Mr. Bell: Well, I don't want to take too many more steps backwards. I thought we were all in agreement this morning that - and after hearing your submissions - that in, for example, in terms of J, it turned them down only because they were late and because there was an arrangement?

Mr. Dombek: That is correct, in J's case.

Mr. Bell: Let's take that forward, slowly, referring then to the bottom of page 3 of your January 19th letter, okay?

Mr. Dombek: Yes.

Mr. Bell: And disregarding for a moment the discrepancy between the amount that you attribute to the August claim and the amount that the Ombudsman attributes to the August claim?

Mr. Dombek: Right, J would be filed in time for the August.

Mr. Bell: Okay, there is still that then, based on your interpretation of 7 (3). The only grounds you are turning down August on is arrangement?

Mr. Dombek: That is?

Mr. Bell: For J?

Mr. Dombek: Yes. And perhaps Mr. Knox has the actual decision of the Commission which was sent to J by registered mail back in May 27, 1983.

Mr. Knox: I will record that, two reasons.

Mr. Bell: If the two reasons are the ones we are just talking about, I don't think we need to take a record of that. All right, so just crawling along now, whatever was provided and available to the commission in terms of the record of the supply of J, was considered to be acceptable?

Mr. Dombek: No, I think there are two reasons, I think that it is important that it be read in.

Mr. Knox: If I might?

Mr. Bell: Sure.

Mr. Knox: The Commission has - this is part of the letter that was forwarded to J:

"The commission has considered your claim filed September 16, 1982 for milk shipped in June, July and August of 1982 and decided that payment should not be made from the Fund for June and July milk because of late filing".

"Regulation 391 also states that payment of a claim may be denied where a producer has made an arrangement with the dealer whereby the time in which the payment becomes

due is extended. On investigating records, it was evident that late payment and non-payment had been accepted by you in the past. The Commission decided therefore, that arrangement existed between you and the processor whereby time on which payment became due was extended and therefore no payment should be made from the Fund on your claim".

Mr. Bell: Okay, I think that substantiates just what we have been talking about. The commission turned down that application on two grounds, late filing and arrangement?

Mr. Knox: That is correct.

Mr. Bell: The commission did not then and does not now, turn down the complaint on the basis of inadequate records?

Mr. Knox: In Mr. J's case.

Mr. Bell: In J's case. Therefore, whatever records were provided to the commission or otherwise available now in respect of the J delivery, were considered - this is implicit now - are acceptable?

Mr. Dombek: That is correct.

Mr. Bell: You are in the corner now, you can't get out of it. The only records we have and you may wish to assist, the only records the Committee has in respect of the J delivery are found in one of the pages 66 through 69, inclusive, of our material and I think we know where I am going to take you?

Mr. Dombek: That is right. Well, I guess we are in a little bit of a problem here because obviously the letter that was sent to J should have included the third reason.

Mr. Bell: Let me caution you, I didn't hear a third reason of that decision.

Mr. Dombek: You are absolutely correct.

Mr. Bell: That is right, and I don't think you want to parachute a third one now.

Mr. Dombek: I think if you listen to what I said and I agree with you, Mr. Bell, that what I was saying is that obviously the letter that was sent to J should have included the third reason.

Mr. Bell: But it did not?

Mr. Dombek: That is right.

Mr. Bell: The question, and I think you know where I am

going and it not only applies to J but I suggest to you that it also applies to P because he was turned down only on late filing and arrangement as well. So we can roll the question into one. If the records for J and P are acceptable, why are they not acceptable for O and N, because they appear to be from the same source. I think the difficulty, Madam Chairperson, is this is that unfortunately the written decision of May 27, 1983 is obviously insufficient. It should have included the fact as all the correspondence between the Ombudsman staff and the Ministry has always stated that there was the problem of documentation.

Mr. Dombek: So I agree with you that it is not in the written decision.

Mr. Bell: Just one more line of question on the issue of the records.

Mr. Dombek: Just before, I didn't really answer your question as to pages 66 and 67. I think the reasons for the fact that those pages are insufficient are found in the January 19th, 1988 letter of Dr. Collins, starting on page 1 and going forward.

Mr. Bell: These are the same records?

Mr. Dombek: Yes.

Mr. Bell: All right. Well, will you agree with me and in terms of the Ombudsman, I guess, you know, you won't agree with me, no sense in asking.

You use the analogy of an insurance fund, is the Workers' Compensation Board and the Fund that it administers an appropriate analogy?

Mr. Dombek: I couldn't tell you because my knowledge of that fund is limited.

Mr. Bell: Then you only want to talk about the insurance Fund, and if I understand the point as you make, you have a similar obligation, in a fiduciary sense, to the beneficiaries of your Fund as insurers have in respect to the beneficiaries of their Funds?

Mr. Dombek: That is correct.

Mr. Bell: All right. You will agree with me though, that insurance companies will allow claims based on a varying degree of particularity?

Mr. Dombek: That is correct.

Mr. Bell: And you will agree if you have experience and I think in another life you did have experience, when you

were in private practice, that an insurance company can allow for example a damage claim without any appraisal or record of the damage?

Mr. Dombek: Yes, I will agree with that.

Mr. Bell: When they look at it in a global sense and make an assessment?

Mr. Dombek: Right.

Mr. Bell: Why can't you do that?

Mr. Dombek: I think the difficulty that the Milk Commission has is one that they have discussed this matter when it was reviewed, when it was being reviewed with the - by the Ombudsman. We have discussed it with the Ontario Milk Marketing Board and with the Ontario Dairy Council. They looked at the matter, as I indicated in sort of my submission, if you will, that they reviewed the matter twice, the individual cases twice and they felt that it would not be in the best interests for the integrity of the Fund or the industry.

Mr. Bell: Why?

Mr. Dombek: The preponderance of evidence, whether it was told to the applicants or not, indicated that there was an arrangement, indicated that there was late filing in some aspects and also indicated that these particular producers did not have sufficient records to justify their claims.

Mr. Bell: Can we then move to Regulation 391 and time for filing question. All right, aside now from the issue of who went bankrupt and when and whether sub B applies. Can you and I agree that this is both 7(3)(a) and 7(3)(b), are what legal scholars and the judiciary call legislation limiting the rights of parties?

Mr. Dombek: Yes, I would suggest that is correct.

Mr. Bell: And can you and I agree that it is a rule of statutory and regulatory interpretation for those type of provisions that they be interpreted strictly against the party relying upon the limitation?

Mr. Dombek: Yes we can agree to that.

Mr. Bell: And that means that where there is an interpretation available in favour of the applicant that that interpretation will probably be the one preferred or chosen by the trier?

Mr. Dombek: In a court of law, yes.

Mr. Bell: In a court of law. Is it inappropriate for this Committee to apply the same rules?

Mr. Dombek: Well, I don't feel qualified to answer that question. I think it is within the jurisdiction of this Committee. I think it would be improper and somewhat presumptuous for me to tell you what rules to apply and what rules not to apply.

Mr. Bell: That is a fair answer, all right. And can you and I agree that 7(3), in its entirety, is capable of more than one interpretation as to when the period expires for the filing of an application?

Mr. Dombek: Well, let's put it this way, I can agree that I would have drafted it in a different manner.

Mr. Bell: And is one of those interpretations in your last known answer, one that is in favour of the applicant?

Mr. Dombek: It is a valid interpretation.

Mr. Bell: This may be like the snail in the bottle that never was because this particular dealer has defined - was never bankrupt, it was not there. The frustration perhaps is we don't know and we may never know, okay. I want to know, are you -- in the the arrangement issue for J, are you admitting that monies would be owing to J for August?

Mr. Dombek: I don't think that the -- subject to the problem with the records, yes, J could claim.

Mr. Bell: Can we move then to the arrangement issue. The third and final issue that you have relied upon and again, arrangement ground only applies to J and P, is that correct?

Mr. Dombek: If we can just have a second because we know who J is, we are trying to find out who P is.

Mr. Bell: If we go to the second last paragraph of page 5 of that letter, your version probably names Mr. P. Our version just calls him Mr. P.

Mr. Dombek: You are dealing with Dr. Collins' letter, sir?

Mr. Bell: Yes. I think if you look at the second last paragraph on page 5 under the main heading, you will see in your version, Mr. P's true identity.

Mr. Dombek: That's right. And basically, would you like to hear the reasons again, Mr. Bell?

Mr. Bell: Well, unless we have a problem, all of the

detail of your letter, under arrangements with the processor relate only to J and P, and that is consistent with the Ombudsman's belief that the reasons they were turned down again were they were only arrangement and late filing.

Mr. Dombek: That is right, that is what was sent out.

Mr. Bell: You mentioned earlier that the evidence is circumstantial?

Mr. Dombek: That's right.

Mr. Bell: Vis-a-vis an arrangement. And that the Commission considered the weight of that circumstantial evidence to be in favour of a conclusion, that is, arrangement, is that correct?

Mr. Dombek: That is correct.

Mr. Bell: I take it then that the Commission acknowledges, by that position, there is no direct evidence that is available pointing to an arrangement?

Mr. Dombek: There is no written agreement or written documentation of any sort that was provided to the commission that would say that there was an arrangement between the producers and the processors. Now, I would suggest to you, Mr. Bell, that that would not be forthcoming from either party.

Mr. Bell: I would suggest that it would not be practical in the circumstances of processors or suppliers, but that is not the only category of direct evidence. I take it that there is also no evidence from either the processor or the suppliers, orally, describing such an arrangement?

Mr. Dombek: Of course not. It would not be in their interest to indicate to the commission that there was an arrangement.

Mr. Bell: Are you imputing --

Mr. Dombek: I am not imputing anything. I am just suggesting it would not be in their interest to be forthcoming with that information.

Mr. Bell: Is that a suggestion that they might not be up front and honest about what really went on?

Mr. Dombek: I would not read that into my answer at all. All I am saying is it would not be in any applicant's best interests to say, oh yes, the regulation says that if there is arrangement, I am not going to be paid. Well,

excuse me, Mr. Chairman of the Milk Commission, I had an arrangement, now don't pay me. I don't think that human nature being what it is that the majority of the people would tell us that.

Mr. Bell: I think we have to clear this. These individuals, if we, if we accept everything the Ombudsman's office have told us, J and P have said there was never an arrangement. Now, is there any reason why we would not accept that evidence?

Mr. Dombek: Yes, I think again if you take a look at Dr. Collins' letter of January 19, I think again the preponderance of the information that is contained at pages 4 and 5 would suggest that there was. Whether there was a specific, I doubt very much that there was a specific written agreement. Again, I return to what Mr. Bossy said, there was these side deals, don't pass my cheques because they will bounce and let's not cash it for the next two or three months and those kinds of side deals are arrangements.

Mr. Bell: This is for future reference in another context. Would the commission's attitude towards that evidence be different if it was taken under oath?

Mr. Dombek: I think it might be. In fact, I think that would probably, it would certainly change the credibility of the situation.

Mr. Bell: Madam Chairman, could I just have a moment?

Madam Chairman: Question, Mr. Philip is first.

Mr. Philip: I want to start out, I guess you mentioned insurance, can this particular program be analogous to what would be called the mutual insurance?

Mr. Dombek: I am not certain what mutual insurance is, perhaps Mr. Knox would like to explain.

Mr. Knox: I can't compare it, sir, to mutual programs but I can explain the program and how it operates, if that would be of assistance.

Mr. Philip: I think you have already done that. You have said that it is an insurance. All right, the insurance then, you have said that it was analogous to all of the monies that came in from the insured and all the monies - is there matching?

Mr. Dombek: No. I can provide some of those details if you like, the program was put in place in 1967. The program was put into place with the processing community putting into a fund to provide coverage to producers who would not be paid and shortly after that, the Milk Marketing Board

agreed that they would pay on a voluntary basis, monies in, as well.

So that is the processors as well then as the producers paying in. But it was not by regulation but it was by agreement and it was at this point that the milk producers, the cow milk producers and cream produces both contributed to the Fund as well as the processors.

Mr. Philip: So essentially then you have got monies coming in from two sources, the companies that are processing the milk and those that are producing?

Mr. Dombek: Yes.

Mr. Philip: And it was said that it was an insurance, I guess that would be the best description.

Mr. Dombek: Mr. Philip, what I was trying to do was to give you an analogy. I am not saying it is completely similar to an insurance program. I was trying to give an analogy that the Committee could grasp as to what you might be familiar with in the area outside of agriculture and food.

So you know, to directly compare this program to an insurance program, I think is perhaps a little unfair to what I was trying to do, with the greatest of respect.

Mr. Philip: Seems to me that if I have a wheat field in Saskatchewan, and I buy crop insurance, the one thing that I can be assured of is - or if I happen to be a businessman here and I buy a liability insurance, the one thing that I can be assured of is that I receive a policy, and that policy outlines my obligations as well as the obligations of the insurer.

Would you not say then that there was some responsibility on the insurer, namely, the Commission, to at least provide Regulation 391 to the insuree. And how can anyone fulfill his obligations, be it in regard to filing or any other matter, if he has not received what amounts to the policy, the policy in this case being Regulation 391. Would you explain that to me?

Mr. Dombek: Would you like me to try to explain the second question first or the first question second?

Mr. Philip: Any order you want.

Mr. Dombek: Let's try the second one first. I think that it is a given that regulations, as legislation are published in the Ontario Gazette. I think familiarity with the agricultural program, this particular program, I think it would be certainly fair to say that the vast majority, if

not all farmers, are aware of the various programs that are put out by the Ministry of Agriculture and Food, whether they be Crop Insurance, the Milk Fund, the OMAF Program, Plus Program, Farm Start, whatever. And these are regularly publicized. The criteria that are used in Crop Insurance and so on are explained by the adjuster to the farmer, applications are given and so on. So I think that there is an attempt through publicizers and through the various marketing boards to pass that information on to the producers.

Mr. Philip: Well, I may not be a farmer, but my previous reincarnation before I was elected was an employee of the Federation of Agriculture, so I am familiar with some of the publications that are put out. And I am also familiar with the fact that if you are in a relatively new kind of occupation which is a market which is building fairly quickly with immigration and so forth, namely in the goat meat trade, that there would be perhaps a little less sophistication or knowledge of particular programs. And subsequently, I would think, a little bit more obligation on the government not to simply rely on somebody who may be a part time farmer or indeed involved in some other form of agriculture and goes into a new market area would necessarily think of reading the Ontario Gazette as his homework when he starts into having three or four goats then in his backyard. Would that be reasonable?

Mr. Dombek: I think that is a good point but I would also like to point out that there is, as you are probably aware since you were with the Federation of Agriculture, there are what you call agricultural representatives in each county. I think we cannot work under the assumption that the agricultural industry and the farmers are working out there in a vacuum and they do not get information from any - whether it is the Milk Commission or the Milk Marketing Board - information is shared through a variety of sources in what is called a Ministry of Agriculture and Foods News through various publications of the Milk Marketing Board which all producers get. They have quite an extensive newsletter and so on.

So the information is there, if you want to seek it out and in these particular cases, the Dairy Inspection Branch was out there, they met with the complainants, they looked at the processor involved, they inspected these premises, these people were licensed.

If you look through the documentation that was provided to you, you will find that Mr. -- or Mrs J, I believe it was Mr. and Mrs. J, were a little concerned to put in a complaint in regard to the Fund or claim to the Fund because they felt that the processor's license would be taken away. Those are the kind of things that the industry knows and whether they have a copy of the regulation in their back

pocket, I think Mr. Bell and I agree that section 7(3) perhaps could be reworked in its drafting style. And I would think that when you get two lawyers in a room you get three legal opinions. I would think that for someone not as well versed in law it might even be worse, there might be four or five different opinions.

Mr. Philip: Well, if you want to speculate, I can speculate too. I am willing to speculate that there were probably very few ag. reps. there, that if I gave them an exam --

Mr. Lupusella: You can't speculate, you have to revise the facts before you and that is your --

Mr. Philip: As I was saying before I was rudely interrupted by Mr. Lupusella, if I were to speculate, I would speculate that if I gave an exam at that point in time to the ag. reps. and asked them to define or tell me what Regulation 391 was, probably a great number of them wouldn't even know, let alone know to go out there and present that information to the particular farmers. Very few of them would be in this business?

Mr. Dombek: However, I suppose if you ask them about the Milk Fund they might be able to give you that information.

Mr. Philip: Well, they might, but I doubt that the average ag. rep. up there has, as his highest priority, going out there and helping goat farmers in some remote part of Ontario or wherever these people are located.

I wonder if you can tell me on page 2, where it says:

"The problem is that the records were not recapped by day or product."

The recap would be done by the company, would it not, that is not referring to the producer?

Mr. Dombek: I am sorry, Mr. Philip, whereabouts on page 2?

Mr. Philip: Page 2, first paragraph?

Mr. Dombek: I see, right there. Perhaps Mr. Knox or --

Mr. Knox: That would be right.

Mr. Philip: So that is the processor that you are accusing of mucking up, not the insuree, but the processor. So it is not the insuree's fault in this instance either.

I wonder if we could go down to the bottom of the page.

November was not recorded in order by date, that again is the processor not the producer. I wonder if you can -- you make much of the page 4, and the implication is that somehow the overestimates might be attributed to the processors, is that the, I mean to the producers, the local farmers, is that the implication on page 4?

Mr. Dombek: I am sorry again, could you be a little more specific, where you are?

Mr. Philip: Yes, the problem that the auditor has?

Mr. Dombek: On March 11?

Mr. Philip: That again is the producers error or poor judgment or actions, if you want, a last judgmental word or is it the processor?

Mr. Dombek: I think I should make this clear, Mr. Philip. We are not saying that this processor was an ideal processor, far from it. And when the auditors tried to get information from the processor, they were very severely rebuffed, as I indicated to you earlier. I agree wholeheartedly, the processor in this particular case has a lot of the blame, no question about it. However, when the Milk Commission, when the Fund asked for supporting documentation from the producers, that was not available either.

So the Fund is in a Catch 22 situation. The processor, whether he had the information or not, didn't provide it and the producers could not provide it.

Mr. Philip: Is it not reasonable to say that when a new program is started, and I am tempted, I would have loved to have been a fly on the wall when the auditors met with you and find out what exactly they told you. Maybe you want to share that with us. But there is a certain obligation on the part of the Ministry to, when there is an expenditure, and in this case, it may not be a direct expenditure of the agency then to at least monitor more closely the new guy on the block. And in this case, you admit that you had suspicions about him.

You fail to go in and monitor, at an early stage, as to what he was doing. You failed to inform him of his obligation to have a waiting process that was more in keeping with your -- what you and the auditor feel is responsible. And under the circumstances then, you somehow come back and you say well, the producers perhaps should not have entered into these individual agreements.

Is it not reasonable that if you were a farmer, you did not know that if you were entering into individual agreements, you might be jeopardizing your rights as an

insuree because you were never provided with the policy?

If you are going to have to ship 200 miles, if this plant does go out of business that you might want to try and make the thing work. Particularly if it was suggested to you, by the processor, that lend them a little bit of money that it is a new operation. Would that not be a reasonable thing to do if you didn't know, in entering into those agreements, you might be jeopardizing your chance for a claim under the insurance program that you didn't even know existed?

Mr. Dombek: Well, let me answer you this way, Mr. Philip. This was a brand-new operation. There is no evidence that this organization was not audited by the Ministry and certainly the Milk Commission does not have any legal authority to audit. If anyone does, it would be the Dairy Inspection Branch and audits were carried out by that particular branch. And there were, on occasion, complaints received about this particular processor and questions were asked of that processor why payments were late and so on. And at that time, payments would be made to the particular producer.

So there was an ongoing effort made by the auditing part of the branch to get in there and to keep an eye on this particular operation. And if I may, if I may conclude, or continue, just to finish off. And as part of the fledgling operation, I think there was an effort on the part of the officials of the Ministry to attempt to help this particular processor through being lenient in its interpretation of the regulation as it then was, 629/80. And they knew that if these processors could not take their goat's milk to this operation that they would have to go approximately 60 miles to the Hewitt Dairy in Hagersville and in fact that is what ended up happening after this particular processor went under.

So I guess Ministry officials are in a Catch 22 situation where you have a brand-new operation, a new industry. Back in 1979 and so on, this goat's milk was sort of an in-thing, if you want to put quotations around the word in and it was, it looked like there might be some feasibility to this. So in order to assist, I think perhaps officials in the Dairy Inspection Branch attempted to be a little bit more lenient.

Mr. Philip: Well, when you were assisting --

Madam Chairman: Could I interject. Could you give me some indication of how long --

Mr. Philip: Two more questions.

Madam Chairman: Two more questions, then I will wait.

Mr. Philip: In your auditing or in your dealing with the processor, would you have also interviewed the people that allegedly were not being paid the money, would you have interviewed anyone of these four people that later made claims?

Mr. Dombek: I understand there were discussions between staff and these particular individuals and also other producers.

Mr. Philip: Prior to their making a claim?

Mr. Dombek: That is correct.

Mr. Philip: In discussing with them, would it not have seemed reasonable then for you to sit down and say well, here is the regulation?

Mr. Dombek: Well, my information is that these particular individuals were told of the program, there is a dispute as to that fact.

Mr. Philip: Do you have any record of notation of that fact?

Mr. Dombek: No.

Mr. Philip: Surely there are notes being kept when there is an ongoing investigation?

Mr. Dombek: It was not an ongoing investigation at that time.

Mr. Philip: Well, you were meeting with the company and you say you were also meeting with the producers at the same time. There should have been then notes kept by whoever the representative was that was dealing with the situation, would those notes not automatically --

Mr. Dombek: With hind sight not being 20/20, I would agree with you.

Mr. Philip: One last question. I gather it is the provincial auditor that did the audit?

Mr. Dombek: It is an annual audit and I don't, Mr. Philip -- it is an annual audit.

Mr. Philip: At that time, when he met with you, did he make any comment on the processes, the administration of your program? Did he tell you that you were doing certain things --

Mr. Dombek: No, I think his audit was restricted to

strictly the financial aspect, he was strictly a financial auditor.

Madam Chairman: Before Mr. McLean, who is next on the list, goes on, I would like to bring the Committee up on our agenda problem because of the delay or our extended time devoted to this particular case.

Next up is Ministry of Natural Resources. They have been waiting here today and rather than keep them here any longer and start a case which we cannot necessarily finish tomorrow morning, would it be agreeable to the Committee that we tell the Ministry of Natural Resources that they are to be put on agenda for Thursday morning, at ten o'clock. We would like to keep the two injury Compensation Board that are appearing tomorrow, together, tomorrow. And if the Ministry of Natural Resources come back Thursday, they would actually personally prefer not to go over the two days either if they don't have to, is that acceptable?

Do I hear agreed? Thank you.

Mr. Philip: The sub-committee is scheduled for Thursday morning.

Madam Chairman: For the Ministry of Natural Resources people who are here, thank you for coming today. We do apologize, but due process and due justice and whatnot and we will see you Thursday morning at ten o'clock. It will be in the previous room downstairs, Committee Room 2, unless you see a note on the door.

Mr. McLean, please.

Mr. McLean: Madam Chairman, as you are well aware, my questions are usually short.

Madam Chairman: I agree.

Mr. McLean: I do take somewhat exceptions to the fact that you indicated that this is like an insurance claim. I believe that these people only want to be paid for what sweat and hard work that they have done, just the same as you or I want to be paid for labour that we performed and I believe that that is the essence of this. It is not an insurance claim in my books, it is just payment for the work that you have done. And I believe that whatever amount, on a common sense basis, of production that they have done and delivered to that plant, that they deserve to be paid for it regardless of all the problems that we have had.

With regards to whether they filed anything on time, whether they did not file on time, I am sure that whoever drafted this letter for the Ministry probably cost them a \$100 for the time they did doing it. It goes on in the

paragraph to indicate to me very strongly where the Commission has the discretion to make a payment. And they indicate because of late filing.

Well, I just don't happen to agree, in a common sense way, that that is right. I am sure that if the minister has shipped a load of corn to the elevator and that elevator went broke that he would certainly want to be paid for any of his product that he took there. And I feel that these people only want to be paid for what they have earned and worked for. And whatever that is, the amount of monies that I see, it certainly doesn't appear to be very much.

And I have difficulty that some of the remarks were made, OMAF Programs that are out. They do make a lot of announcements and there is a lot of programs but farmers are not the type of people that are out looking to see what the program is all about, all the time they are working. And unless they are interested in a program, then they will go and look into it. But there are all kinds of difficulties that they have is to qualify for some of these programs. We read about these releases on programs and unless you go or have to go to your OMAF office to find out the in-depth, you do not do it. I am taking from experience.

So all I am saying to you and the Committee is that right is right and wrong is wrong and there is no in-between. And these people have coming to them what they have worked for and that is wages, what they have produced for it.

Madam Chairman: Is there a question there, Mr. McLean?

Mr. McLean: Yes, I just want the legal people to agree with my analogy of it and they perhaps they probably would indicate that they wouldn't.

Mr. Dombek: Well, Mr. McLean, I always defer to experts. It has been a long time since I have been on a farm and I was born and raised on a farm. And I can tell you from my experience, as little as it may be, that when we grew berries, for example, that when my father and I went and took our berries to the co-op or to the growers to have them shipped to the market in Toronto, we always got it shipped and were told how many cases of berries we had. It may not have had the price because the price was set at the market at the food terminal but we knew that we delivered on that particular day, so many berries.

My father was not a sophisticated man at all and certainly -- but he knew what to keep, he knew what to produce and he always got paid.

Madam Chairman: Thank you, Mr. Dombek. We have Mr. Charlton and Mr. Bossy on the list.

Mr. Charlton: Thank you. The processor in question here, was the processor paying his fees to the Fund during the month.

Mr. Bossy: I thought it was reasonable, in the past that we used to have a sort of a rotation within the Committee.

Mr. Charlton: She took us in the order in which we raised our hands in.

Mr. Bossy: I had asked before lunch that I would like to be on, concering the inadequate --

Mr. Lupusella: I agree.

Madam Chairman: I agree, however, that was before lunch. I started a new list. Mr Charlton.

Mr. Charlton: Was the processor in question paying his fees to the Fund during the months in question?

Mr. Dombek: Yes.

Mr. Charlton: What records did the Commission use to determine that the fees he was paying to the Fund were correct?

Mr. Dombek: If I can ask Mr. Beckley, who is the administrator of the Fund, to answer that question.

Mr. Dombek: Perhaps, Mr. Charlton, could you repeat the question.

Mr. Charlton: You told me that the processor was paying fees to the Fund. As I read section 6 of Regulation 391, the fees are paid on the basis of the milk delivered and the price of the milk. Can you tell me what records the Commission used to verify that the fees he was paying to the Fund were correct?

Mr. Beckley: The processors's records.

Mr. Charlton: So the Commission accepted the processor's records in terms of what was being paid into the Fund but you refused to accept the processor's records in terms of a payout?

Mr. Dombek: Perhaps, Mr. Charlton -- we have explained this once to the staff of the Ombudsman, I think you have to go into some detail as to how an estimate is made or how the amount is determined that a processor has to pay, and the difference between the payout and the processor's payment of the fees into the funds, if you can spend a minute doing that.

Mr. Beckley: The fees of the Fund are assessed on the previous year's payments, which the processor provides on the license application. Those are verified by the auditor, from his audit records. Then in 391, it shows you, I think it was \$4 for a thousand on their previous year's purchases of milk.

Mr. Dombek: So Mr. Beckley, if I wanted to get a license for 1988, you would license me on the amount that I processed in 1987?

Mr. Beckley: Right.

Mr. Charlton: So assuming that this processor was, in any number of the ways that you have suggested in terms of payout, overestimating weight and so on, you accepted the auditor's report in terms of volumes, in order to accept fees. But you won't accept the auditor's assessment of the employers or the processor's record in terms of the assessment of a payout. That is what you are telling the Committee?

Mr. Beckley: The processor for the year previous -- 1981, we had --

Mr. Charlton: You think his records were any better the year before?

Mr. Beckley: At least we can get in and see them.

Mr. Charlton: Well, you have got an auditor's report on the records for the months in question?

Mr. Beckley: What auditor reports?

Mr. Charlton: You have an auditor's report on the months in question. You accept the auditor's reports from the year before, do you accept --

Mr. Beckley: The auditor did not have any of the records when he -- and which were provided in October and in November. Those records were incomplete. We didn't have all the records.

Mr. Charlton: What was the evidence that was held up this morning, there were some dates that were reversed in order but they were records, were they not?

Mr. Dombek: Well, I think, Mr. Charlton, in my summation I referred to the problems we had with pages 66 and 67 of the Ombudsman's information. And I refer again to the letter of Dr. Collins dated January 19th, under the heading, "Records of Delivery". So that I think that is the, you know, that is the problem with those particular

records that you find there. So the way I understand it, is that if I want to get a license for this processing year, that the Milk Commission would look at what was available in 1987. It would be based on the amount of milk that I would process and then I would have to pay a fee based on that.

Mr. Charlton: That is the question I asked. Were the records any better the year before than the ones that you found at the end of --

Mr. Dombek: There were no records available and that is the crux of the problem, that, yes, they were available in 1981 so that this processor could be licensed for 1982 but when we tried to attempt to get the 1982 records, either they were not there or they were not provided.

Mr. Charlton: What was it that you held up this morning?

Ms. Morrison: Those were examples from the processor's records. If you look at the letter they are referring to, they tell you what those are, these are summaries of invoices and the processor's financial records the processors deliver to the branch.

Mr. Charlton: But you held up a list this morning, that was a complete record, were they not?

Ms. Morrison: Those were records from the processor.

Mr. Charlton: From the proccessor?

Ms. Morrison: Yes.

Mr. Charlton: The records on which the auditor's reports were made?

Ms. Morrison: They were examples of records, whether those were records -- not for that year.

Mr. Charlton: Basically, what you are telling me is you were accepting fees to the Fund for the period for which you don't know whether the, that the producers are protected or not?

Mr. Dombek: Well, I am not certain that is quite the case, what we are doing is we are basing it on the previous year's records.

Mr. Charlton: That is right.

Mr. Dombek: As to again, I think it is important that I have to read what Dr. Collins says in relation to pages 66 and 67, the documents that were given to the Ministry. And he states:

"I have two concerns about the financial records which were used for these summaries."

These are the summaries of the invoices for Dr. G's financial records.

"In regards to accuracy, the auditor confirmed that there were no scales at the processor and suggested that weights recorded were 'eyeballed' estimates by count --"

-- excuse me, just a second, let me get my censored version here before I owe more cookies.

"In regards to accuracy, the auditor confirmed that there were no scales at the processor and suggested that the weights recorded were 'eyeballed' estimates by count of eighty pound cans."

Mr. Charlton: Were there weights at the processor the year before?

Mr. Dombek: It was probably the same thing.

Mr. Charlton: So the records that you base the fees on which you charged the processor would have the same kinds of records that you are now rejecting the claims on?

Mr. Beckley: If you tie the record of the volume of note, in with the cancelled cheques the year before, in other words, we knew that the producer had been paid a certain amount of money.

Mr. Charlton: So the fact that the producer was not paid in this case is going against the producer who was not paid?

Mr. Beckley: No record as to whether they have been paid or they haven't been paid.

Mr. Dombek: Just to clarify, I think what happened was that there was a cross-check done and it was easier to do because there were cancelled cheques.

Mr. Charlton: Was it the producer's fault that they were not paid so that you didn't have a cross-check done?

Mr. Dombek: Nobody suggested it was the producer's fault, Mr. Charlton, I feel that is a little unfair.

The Chairman: Mr. Bossy.

Mr. Bossy: Just to clarify maybe a little bit, because there was reference made to my statement concerning the arrangements. But also that I did make the statement that

these arrangements or side deals or whatever you want to call them were made based on the -- I made that statement on the basis of evidence that we had here whereby the producers were totally unaware of Regulation 391. So that I want to make sure is clear. They were not aware of their rights under 391 to make arrangements, that the circumstances are different --

Mr. Dombek: I apologize if I took you out of context.

Mr. Bossy: They are inadequate documents and I just want to go back to the sheet having received this morning from the Ombudsman. I believe as far as the claims on the Fund from the Milk and Cream Producers, and those records from June, July, August, September -- as I look at that, and I am sure that everyone else should have read into this, that for records purposes, would you say that if you look at Mr. and Mrs. J, the shipments, the monies owing, June, July and August, are fairly stable amounts?

In other words, based on the herd they might have for shipment, the amount that they shipped and was owed for those months. If you look at Mr. and Mrs. O, that July and August are very close to being the same as legitimate shipments. That would be their production under normal circumstances. The 243, they may have shipped 200 miles away or fed to cattle.

Mr. P, again goes two months June and July, very similar, which would be the basis of their reasonable records of actual shipments per month. The following month, August, diminished because of shipments elsewhere or in this case there was still \$55 owing.

Then you go to Miss N. Again, he has fairly reasonable figures at being clearly stable amount of milk being produced and shipped and being charged. So that when we are looking at inadequate records, these here would indicate, if they are factual and you would have so tell me if you dispute these figures as being factual. Based on your previous records of shipment, these same people, because these are the people we are dealing with, in the year before and the auditors could have gone into the records to find what these people were shipping before, even though they may not have been recorded the way they may have been done in the farmer's fashion and the records in shoe box or whatever they might be. Would you agree that these figures are fairly, fairly accurate for those individuals for a monthly shipment?

Mr. Dombek: No, and I will tell you why because these figures are money figures and the amount will vary, depending on the cost of the milk and the price of the milk so that there is a monthly variation and again it will depend on the amount that is produced by that particular

animal.

Now, again, you can't go back to last year's records to verify because again the producer may have had a larger or a smaller herd and again the prices would vary on a monthly basis.

Madam Chairman: Mr. Bossy, before you go on, Ms. Morrison.

Ms. Morrison: I just want to stress that the price never changed from the time it was fixed, March 31, 1981 throughout this period of time.

Mr. Bossy: Because it is strange that all four seemed to have a relative stable shipping and thereby creating records, may not have been on paper. Well, the production can vary and the dollar value used here indicates that there is some variation and there is substantial variation of these people when they changed their shipping methods when they got suspicious of non-payment of whatever it may have been, whereby they ship to others.

Now, this is, this scenario in the records not being too accurate, we have these other statements here of records that the auditor or whoever would have had available to look at and you dispute that those are incorrect?

Mr. Dombek: Well, we are disputing the fact that the information where they were derived from, the information was not verifiable. I mean, certainly there are records, no question about it. But what we are saying is that the source of them is in dispute.

Mr. Bossy: But the inspection and I just want to just go back in fact and to some of the questions that we talked about -- the previous year, to come to the conclusions that the processor was worthy of a renewal of his license. Now, the records must have been adequate enough or you should have been very suspicious to be able to renew?

Mr. Dombek: Well, the records were there and again it was possible to verify those records, through, as I indicated earlier, by cross-checking them with other documents such as the cancelled cheques.

You see the processor is not going to want to pay a larger fee then he necessarily has to. So when he does his application to be licensed, he is going to be as accurate as possible so that the fee he pays is going to be as low as possible.

So then it was in checking that and in checking his application and the figures that he gave along with the cancelled cheques that the producers had received, which

again, through that cross-checking method, it was possible to say, yes, okay. But what happened, what happened was that once he started to have these difficulties and once the company went under, I mean his cooperation, okay, he cooperated with officials in both milk and the Ministry because he had to have a license. But once he was no longer in production his cooperation went down the tubes.

And as I indicated, when the auditor went out to attempt to get these records, and to seize them so that there would be able to be some cross-checks, he was confronted with two large dogs and a riffle of some sort.

Mr. Bossy: Now, the Commission would have informed the processor concerning Regulation 391 because if you set fees for deduction, in other words, whereby the processor paid the Commission into the Fund, was there, in 1981, was there any record whereby the producers who were paying, were paying into that fund because if the processor was paying the producers should have been paying. The producers, we are told, were totally unaware of Regulation 391 until the guy got into trouble, the person, the processor. This is why I have a hard time understanding why monies were being paid into the Fund and the producers were not aware they were paying or were they paying?

Mr. Beckley: No. The producers did not not pay, at that time.

Mr. Bossy: Why not?

Mr. Beckley: The producers were not assessed a fee in those days, the processors were assessed a fee and the Ontario Milk Marketing Board give a grant each year because they could see the benefit of the Fund to the milk producers in Ontario but the producers had no -- there was no fees assessed against the producer.

Mr. Bossy: So the responsibility was entirely on the processor, to protect the producers who were not aware that they were being protected, that seems to be a strange concoction or system?

Mr. Dombek: I think from telephone conversations with producers in 1980, 1981 and early 1982, yes, they were aware of the Fund.

Mr. Bossy: I will just drop that just for the moment, I want to go back --

Mr. McLean: You know I have been a producer for 28 years and until today, I was not aware of that section 391. That may be my stupidity but I am telling you I am not all that dumb and most of the farmers in Ontario do not know what 391 is.

Madam Chairman: Mr. Bossy, you have the floor.

Mr. Bossy: I just wanted to go back and it was one of the last questions just before dinner and it brought this question to my mind and having been a farmer myself and dealt with the farming business community for 18 years before, it seems quite strange that the milk producers were, taking all into account, producing milk for a month and shipping milk for a month, the payment then being due on the first.

In other words, the milk they shipped on the 30th and 31st was due on the first of that month. You must have, you should have been able to answer this question, are you aware of any processor that pays on the first of the month?

Mr. Dombek: Mr. Beckley is indicating that he is not aware of it.

Mr. Bossy: So that it would be normal practice to use the farmer's product and money indirectly for at least 15 days before they make payment?

Mr. Beckley: That is the standard practice today.

Mr. Bossy: And that is the standard practice?

Mr. Beckley: Yes.

Mr. Bossy: So that it goes back to that 30 day period that we are trying to interpret, seems to be, very, very on shaky, shaky ground.

Mr. Dombek: Well, it becomes very short.

Mr. Bossy: Well, you should say 15 days and not 30, it is very misleading?

Mr. Dombek: Probably that could be clarified but you are absolutely right that if a payment is not due or is not made until 15 days after it is due then really the time frame it does shorten.

Mr. Bossy: Because, knowing business how it operates with the farming community, you like to use the other business equally. You like to use the other guy's money as long as you can and because you don't have to pay interest on it. So that question I have, and I agree with Mr. Charlton, it is worth taking really 15 days as the regulations are written and the law is written.

Madam Chairman: Any final questions, Mr. Bossy, at this point?

Mr. Bossy: No, I will come back.

Madam Chairman: Thank you. Mr. Johnson.

Mr. Johnson: Thank you, Madam Chairman.

I have a bit of concern about the same problem that Mr. Bossy has about the consistency of the record, and we will refer to the claims for Milk and Cream Producers and deal specifically with Mrs. N and according to the claim filed October 28, 1982, in July - \$340, in August - \$372, and in September - \$311. And as Mr. Bossy points out, that is very consistent. But it is my understanding the processor went out of business on September 8?

Mr. Dombek: Yes, that an auditor -- when these problems came to light, the plant was visited by a Ministry official and it was closed, there was no processing going on.

Mr. Johnson: Then I would like Mr. Bossy to explain to me or possibly the Ombudsman, how in seven, eight days can the same number of goats produce the amount of milk as they did for the month of July and August?

Ms. Morrison: According to the processor's records, the person in question did not deliver the same amount of milk in September as in the earlier two months. According to the processor's record, the September delivery was 896 pounds compared to the 1370 pounds which would have given that figure of \$311. The figures that we have there are the figures that are according to the Dairy Inspection Branch auditor, Mr. Whitehead. So that is my answer.

Mr. Johnson: You are getting these figures?

Mr. Dombek: No, the only figures that we have that we can base these, that we have provided to the Ministry to base these claims on are figures which were collected by the Ministry auditor.

Mr. Johnson: Is there a claim for \$311 for milk shipped in September?

Ms. Morrison: The processor's records suggested that she shipped 896 pounds.

Mr. Johnson: \$311?

Ms. Morrison: \$311 is equivalent to 1370 pounds, that was the figure according to the Ministry's inspection person which we used in our records.

Mr. Johnson: Mr. Knox, is it your understanding that in September there was a payment for \$311?

Mr. Knox: Well, I don't think the claim was made for

\$311. I think what was requested -- yes, I guess that is the bottom line, because what is done, I think these figures reflect that the poundage the complainant made in relation to the formula as to the amount of milk that was actually costing. So when you multiply the two, you get \$311.

But the process, as Miss Morrison points out, there is about a 500 pound difference between -- and again this goes back to what I have been saying about these figures and about pages 66 to 67. There is a 500 pound difference between what the complainant asked for and what the processor, according to what I have heard today, has available.

Ms. Morrison: That is why we have provided those figures to the Ministry to see if those figures would be a satisfactory basis on which to settle the claims.

Mr. Johnson: That is if in the case of Mr. and Mrs O. it is \$748, \$668, and then drops to \$243 which is quite reasonable. And in the case of Mr. P, it is \$486, \$438, \$217, and drops to \$55. I am just confused about the lack of decline in the short period of time in August, that is all.

Madam Chairman: Thank you, Mr. Johnson. Mr. Carrothers.

Mr. Carrothers: Just on this question, do we have a listing on the materials, the amount that was claimed?

Ms. Morrison: No, you don't.

Madam Chairman: Mr. Dombek.

Mr. Dombek: Yes, we have got a document that was prepared by Mr. Beckley and it lists all of the, I guess the 12 people that were shipping milk at that time.

Madam Chairman: Before you go on, Mr. Dombek, two things, first to make sure that you refer to the four that are in question and Ms. Morrison would you be aware of this material that they have, would you have been aware of the material.

Mr. Dombek: It was in the file but it probably -- this particular document was produced just for this particular meeting. It is based on the letters that the applicants sent in.

Ms. Morrison: We would have those original letters, those original claims. We haven't got them listed in that way.

Madam Chairman: Okay, if you you could just, if Mr.

Dombek has no objection, give us the numbers, and if you see any inconsistency, please make a note.

Mr. Carrothers: If I could, in a comparison between these figures that the Omubudsman has provided us and the figures --

Ms. Morrison: Can I correct that just for the record. The figures when you say the Ombudsman has provided, these figures are the figures that the Ministry auditor obtained. We provided them to the Ministry at the last moment in August, which we thought was the last moment and hoped that they would say yes, indeed these are figures upon which a settlement can be made because these people did infact have some documentary evidence of their claim. Those were not the Ombudsman's figures, I just want it to be clear.

Madam Chairman: Mr. Carrothers.

Mr. Carrothers: I just wondered if we might get some indication as to where those figures differed from those on the listing we got this morning.

Mr. Dombek: Sure. With Mr. and Mrs. J for June, the claim was for 2280 pounds which translates into \$541.50. For July, the claim was for 1700 pounds and translates into \$233.75. For August, the claim was for 1680 pounds which translates into \$229 even.

For Mr. and Mrs. O, the claim for July is exactly the same. It is 5,566 pounds which translates into \$748.46. For August, the claim was for 4700 pounds which translates into \$668.35. Again that is the same. And for September, it was 1262 pounds which translates into \$242.93. Again, I guess, there is some rounding.

Mr. P, in the June claim is 2800 pounds which is \$479.80. The July claim is for 2560 pounds, which translates into \$449.20. The August claim is for 960 pounds which translates into \$218.40. And the September claim is for 240 pounds which translates to \$54.60.

And finally, Miss N, the July claim, oh, these haven't been figured out.

Mr. Knox: If I could, Madam Chairperson.

Madam Chairman: Yes, Mr. Knox?

Mr. Knox: Miss N. This came from the information they have provided to the Milk Commission. At that time, they did not put a dollar value on that. Unfortunately, we can't extrapolate because as has been seen earlier, depending on whatever conditions, price was established, there is not a good correlation between pounds and dollars. I guess what

we could read into the record would be the pound but it would be difficult for us to extrapolate what price they would have received had there been payment for that milk.

Madam Chairman: Mr. Carrothers.

Mr. Carrothers: Do you disagree with what has been said about the fact that the price had been -- all the way through this period, the price was supposed to have been the same --

Ms. Morrison: Our understanding is that the price never changed throughout this period and you could use the --

Mr. Knox: If I could, I am not sure what the price was that was arrived at this particular dairy, most dairies the price is arrived at based on butterfat component or some other things which derived price. And if I could use one of the complainants and one person who did not come forward to the Ombudsman, in this case, in the 2280 pounds developed \$540, whereas 3478 pounds developed \$321. So more milk produced \$200 less revenue to the farmer, I can't explain that.

Ms. Morrison: I think it was a two-tier pricing system, there were two different prices and it depended on how much of each different type of milk they delivered.

Madam Chairman: I think that was referred to in the documents, may be we should have it on the record, but Mr. Carrothers, would you agree that the documents we have thus far are sufficient, if we don't have the price at this time, poundage?

Mr. Dombek: I think he indicated, you know, the difficulty with the two price system, the quality of the particular milk, the amount of butterfat that is on.

For Miss N, it was indicated that in July - 1597 pounds. In August - 1847, and in September - 1370.

Madam Chairman: Thank you, any further questions, Mr. Carrothers?

Mr. Carrothers: Yes, the time limit for the filing. I just wondered what the Commission's practice is normally with respect to deadlines, is it absolutely strictly adhered to or has the discretion been exercised in other cases regarding late filings.

Mr. Dombek: The discretion is there and it has been used in the past. It depends on the particular situations there have been. We were discussing it this morning, prior to this morning's meeting where I believe it was the Milk Marketing Board itself, gave an indication on Thursday or

Friday that it was going to be filing a claim and that it would be late. And we will honour that claim. Again we were given a little bit of notice even though it was a little bit late and we got that claim in, so it does --

Mr. Carrothers: You have exercised it in the past?

Mr. Dombek: Yes.

Mr. Carrothers: You mentioned a fiduciary duty or obligation in managing the Fund, is there some prejudice to the Fund, accepting late filings? Is there some cashflow situation, something that arises? What would be the argument for not --

Mr. Dombek: Well, I think that if there was a run on The Fund if a large number of our processors, well, if any of our, if one of our large processors failed, that the Fund would not be adequate to cover the loss.

Madam Chairman: Could you give, for the record, the approximate value of the Fund or would that be available, the value of the Fund, just so we can --

Mr. Beckley: 1.9 million dollars in the Fund.

Madam Chairman: Thank you, very much. Mr. Carrothers, do you have any more questions?

Mr. Carrothers: Well, I guess I am not sure if that answers the question, I guess you are saying that if everybody made the claim --

Mr. Dombek: Not if everybody, if one large dairy went under --

Mr. Carrothers: And if everybody claimed in time, there would be trouble?

Mr. Dombek: Well, there would not be enough money at all. Perhaps just to expand --

Mr. Beckley: It would be interesting for the Committee to understand that if the Fund in place provides revenue to those who claim and whose claim is acceptable.

In the case of cow's milk, the Milk Marketing Board markets on behalf of all producers, the milk to processors. So the Milk Marketing Board itself would call this call indicating that we haven't received payment for this milk.

We are concerned about it and we are putting the Fund on notice that we would be putting forward a claim. So that the Fund covers the milk as we have gone through the various dates that the milk is produced this month, payment is made

the following month. So that there is exposure in the Fund for upto 60 days. Some of the large dairies certainly purchased millions of dollars during that exposure period. Tens of millions of dollars during that exposure period. So it is a very important task to administer the Fund and it is a task that is handled very carefully.

Mr. Carrothers: What I was getting at is to exercise the discretion to accept the late filing, just by doing that, you are not putting the Fund under any financial strain. The strain might come in because of a large claim but that is something else?

Mr. Dombek: Yes, that is right.

Mr. Carrothers: Accepting a late claim is not prejudicial to the Fund?

Mr. Dombek: No. That is why the officials look at the particular circumstances of the case.

Mr. Carrothers: Thank you.

Madam Chairman: Thank you. Mr. Morrin.

Mr. Morrin: I am intrigued with the processor, was he ever a producer before?

Mr. Dombek: I believe he was a professor of something or another, at university?

Mr. Morrin: Was he ever a producer, himself?

Mr. Dombek: I understand he was.

Mr. Morrin: Was he a producer in the area?

Mr. Dombek: Yes, and he shipped himself.

Mr. Morrin: So he was known by the producers?

Mr. Dombek: I believe so.

Mr. Morrin: Because I believe that, I feel, if I can call it a paternity of goat milk producers must be very small?

Mr. Dombek: Yes, I believe there is only about eight dairies.

Mr. Morrin: They must know all the rules and regulations, if there is a buck to be made, if there is a dollar to be made, surely before you go and invest money. I just want to raise that issue, the same point that Mr. Johnson raised. Before you invest \$6,000 you want to be

sure that your money is protected. You want to be sure that you have at least a decent return on it. Surely whoever that processor was, who obviously had some experience before would have passed on that information to the producer and said, look, you have invested \$6,000 with me or let's do it together we will have a certain return. If it does not work at least you are sure that your production is going to be protected in some way. You know you normally don't invest money in something that you would not know what you are getting into. You would know that Mr. Philip, surely, a man of experience --

Mr. Philip: There --

Madam Chairman: Mr. Morrin has the floor.

Mr. Morrin: That is my question, how come that the producers themselves who were not informed, that the processor was contributing to the Fund? I find this difficult to understand that.

Mr. Dombek: I share your difficulty there, I think you have asked one of the key questions.

Madam Chairman: Mr. Bossy.

Mr. Bossy: Could there be a possibility that the Commission in the decision to deny may have been influenced by the fact that the producers, at that time, were not paying any fees into the Fund?

Mr. Dombek: That would be speculation but I don't think that that would have entered their mind. I certainly, unfortunately both Mr. Knox and I are sort of new kids on the block and we were not there when this particular case was being considered by the Commission, so we can't, we don't have any knowledge of what they discussed.

Madam Chairman: Were you finished, Mr. Morrin?

Mr. Morrin: Yes.

Madam Chairman: Mr. Lupusella.

Mr. Lupusella: Please tell us, you brought to the attention of the Committee, 12 people that have problems in relation to the past, how come the Committee has just the case of J, O, P, are they going to wait the result of Mr. J's case to apply or they are evidenced before the Ministry that they will apply?

Mr. Dombek: Well, I can -- again somewhat speculation, but I would think that if the recommendation was to pay these four complainants that the other eight people that were denied would be banging on the Commission's door.

Mr. Lupusella: Do do you have evidence about the eight people, what the status of their claim is, are they late in filing their claim or there are other items attached to their case which the Ministry is going to have a hard time to accept the claim.

Mr. Beckley: No, I don't have that information here, other than to say --

Mr. Philip: Point of Order.

Madam Chairman: Yes.

Mr. Philip: We only have four cases before us, I wonder if it is appropriate to speculate on what would happen, hypothetically on a whole bunch of other cases.

Mr. Lupusella: There may be twelve cases --

Mr. Philip: They are not in evidence before us, we are here to judge.

Mr. Lupusella: It was in evidence which was presented before this Committee, therefore before I would make a final judgment on these four people, I would have liked to have more information about the other eight.

Madam Chairman: And since the records are not available and I do understand that is true, I don't have to make a ruling on this. But I do agree with Mr. Philip that although those eight were brought in, I don't believe they have been brought in in the documents. I really think we should try and keep our questioning and other decision making to the floor in question. Mr. Lupusella, any further questions?

Mr. Lupusella: No. Thank you.

Madam Chairman: One final question for Mr. Carrothers

Mr. Carrothers: Just one other thing. Back to the arrangements which I guess you indicated before the Commission existed, Mr. J or Mr. P, I wonder if you might indicate what might be prejudicial assuming there was an arrangement and there was a bit of acceptance of late payment, why it would be prejudicial since it was that you wanted to use this as a reason for denial of claim?

Mr. Dombek: If I could, we are not too sure who is going to answer this question.

Mr. Knox: If I understand the question, if there was an arrangement why would we consider that grounds to not provide --

Mr. Carrothers: Yes?

Mr. Dombek: I guess if we could go back to the comment made earlier today about the payment of corn, and people want to be paid for what they produce and we certainly subscribe to that as the administrators of this Fund. We want to ensure people are paid for what they work hard to produce, providing we know whether or not they have been paid, or whether or not they have been paid in some other way which could have been an arrangement or have agreed not to be paid for some reason. And that has been the difficulty throughout this case.

And when we talk about lack of information, although it can be argued perhaps that is not in the regulations and that goes along with the arrangement.

As an example, if a goat were transferred from the processor who also was a farmer, we have indicated, to another farmer, and we are aware of that through evidence we can get the through the national livestock records, that a goat was transferred. And if neither of the persons who transferred a goat from his herd to the other, or the person who received the goat can give us any indication as how much that goat was paid for or what payment was received and is that an arrangement. And it in fact was in lieu of the payment of goat's milk.

But the arrangement, Mr. Carrothers, the Commission has put forward, did exist, strictly related to accepting late payments were not alleging that there was perhaps any other form of payment.

Mr. Carrothers: I am just wondering why the fact that they might have taken cheques late or not would request an arrangement that you would want to use this section to disqualify a claim for it?

Mr. Dombek: I guess the concern is if they continue to accept late payment or no payment then at some point when the processing firm would cease to continue to operate then they may come forward and make a claim.

Mr. Carrothers: But when did those other arrangements expire or in fact was there some payment made that we are not aware of?

Mr. Dombek: I guess, Mr. Carrothers, it goes down to there are a lot of producers of dairy products out there that are playing the rules fairly. They don't have, they are not in colusion with the processors and --

Mr. Philip: Point of order.

Madam Chairman: Well, Mr. Dombek?

Mr. Dombek: I am more than willing to withdraw that and I apologize.

Madam Chairman: That is accepted.

Mr. Dombek: I guess what I am trying to say, and I am saying it very badly obviously, is that it is the integrity of the Fund that I think the Milk Commission is concerned about. And that when the evidence, at least in the Commission's mind, whatever it was, and in this case it may have been done for very good and legitimate reasons, when an arrangement is made for late payments or whatever, that those payments should not be honored in a claim.

So I think that is really, that is really the bottom line.

Mr. Carrothers: Were you arguing then, perhaps if you take the case of Mr. and Mrs. J, that say that their claim for August, did they agree that it be paid later and that somehow put them outside the claims period? Is that the type of logic that you bring in here?

Try and understand what the problem is just because they had agreed to accept late cheques in terms of making payments out of the Fund?

Mr. Dombek: Perhaps I am being a little brisk because of the time.

Mr. Carrothers: Maybe I haven't understood.

Mr. Dombek: No, I am sure you have understood.

Mr. Carrothers: The arrangement that is being alleged is that people were not basically adhering strictly to the 15th of the month or whatever it was the date they should be paid for. Did they agree to take the cheques later?

What I am just asking is why that fact would prejudice the Fund such that you would want to bring forward that type of record? I can understand the kind of thing you are talking about, that some other thing was done in payment or in lieu of payment but what I don't understand, why just the fact that it was late would prejudice the Fund? I am just wondering why.

Mr. Beckley: If I can try to help with that. We have several financial protection programs that the Ministry is involved with. It is not government money that we are involved with. And one of the corner stones of all of those financial protections programs, including this very important one is that we encourage prompt payment and we are

concerned. And the comments made around this table when people use farmers' money. And in order to encourage prompt payment, we put in place things like you need to pay by a certain amount of time. And in this case, we had agreed that the 15th of the month is the reasonable rate.

So when people make an arrangement other than that, and while it is not well known what that arrangement is or why that arrangement is made, it contradicts one of the principles of financial protection programs which is the essence of prompt payment. To ensure that farmers are paid for their product in a timely fashion, we don't indicate which date but we indicate within a short time frame, so that if there were some reasoning that we might draw from the fact that an arrangement was made. It goes against that fundamental principal of the financial protection programs.

Mr. Carrothers: What you are saying is that somehow if they would agree to a later date than they might create a claim that would not otherwise exist against the Fund?

Mr. Beckley: Possibly.

Mr. Carrothers: Are any of these in that category. It seems to me that we are sort of ignoring that late payment when when we arrive at the figures that these people claim, you know, that they were within 30 days or 60 days of payment. The fact that they had agreed to accept late payment for other payments is not coming. In other words, these figures are not figures that are created by an arrangement to take a late payment, is that a fair statement?

Mr. Beckley: It might be, we would have to check the records, there were three reasons for refusal and if you wanted to point out one of the particular letters that we were dealing with, then I could respond to reason given to see if --

Mr. Carrothers: Well, back to Mr. and Mrs. J, there was a poundage read out. It was their delivery for the month, payment for that month. None of that figure related to a delay from the previous month, which I think is what you are telling me might be the prejudice to the Fund?

Mr. Dombek: Here is again what was written to Mr. and Mrs. J on the Commission, on May 27, 1983:

"The Commission has considered your claim filed September 16, 1982 for milk shipped in June, July and August of 1982 and decided that payment should not be made from the Fund for June and July milk because of late filing."

Mr. Carrothers: Late filing. But I am talking about the arrangement?

Mr. Dombek: I see.

Mr. Carrothers: Some of these claims, I am just trying to find out why these arrangements, assuming they exist for the purposes of discussion, why these arrangements might be prejudicial to the Fund?

Mr. Dombek: Well, in the sense that they would be prejudicial by depleting the Fund, obviously that is not a problem, you know, because the claims are small in relation to the amount of money in the Fund.

Mr. Carrothers: It seems that even the figures that have been used or that you have read out, don't include any kind of delayed claim or against any delayed payment. These are within the month or the figure for August, is the delivery in August?

Mr. Dombek: That is right.

Mr. Carrothers: It is not a hold over from July or hold over from June because of an agreement to delay?

Mr. Dombek: You see what the delay payment indicated to, again, I think what the delay payment indicated would be that it was evidence or some evidence of this arrangement which again is prohibited by the regulation.

Madam Chairman: Are you finished, Mr. Carrothers?

Mr. Carrothers: Yes.

Madam Chairman: Mr. McLean.

Mr. McLean: Well, I was wondering if there is an expert here that would tell how much a goat would produce in a year?

Mr. Dombek: I have asked that question myself. I guess it is so variable.

Madam Chairman: Do they get a bucket a day.

Mr. McLean: I never usually ask a question unless I know the answer. About 5,000 pounds.

Madam Chairman: 5,000 pounds from a goat in one year. Is that your question, Mr. McLean? I have one question and it is with regard to this section which I must have eaten during lunch, section 7(3). And I guess it is the due dates and whatnot and if I could just pose a hypothetical question. Given that you admitted earlier that a comment for processors to pay producers approximately 15 days after the due date, or the 15th of the month. Now, just say

hypothetically, if I, as a processor -- as a producer, am concerned that the processor is not going to come through on the 15th of the month and want to make sure that I file my claim on time and I was to file five days after the end of the month, would that be an acceptable claim?

Mr. Dombek: Possibly.

Madam Chairman: Because it is five days late?

Mr. Dombek: And there is the discretion with the Commission to review that as a possible claim?

Madam Chairman: And what would you do with it, before the 15th, what would be done with it before the 15th day?

Mr. Dombek: You are filing early?

Madam Chairman: I am not filing early, I am filing within my 30 day limit.

Mr. Dombek: Prior to payment?

Madam Chairman: Prior to payment, five days after the due date, what would you do with it, before the, between the 5th and the 15th?

Mr. Dombek: If I might respond as to the recent one. When the Milk Board called us, we have not received payment, we are concerned about that and we are putting you on notice that we may be filing. We said that is fine, we accept that and please notify us further.

Madam Chairman: If I sent in an application after five days to ensure that I file on time, because there I was dealing with the processor who was not going to pay me on a regular basis and I didn't want to encourage arrangements of any type for whatever reason. That every five days after, would you do anything with that between the 5th and the 15th day of the month?

Mr. Dombek: They would probably acknowledge receipt of it and hold on to it until the 15th had come and gone and then if payment had been made, fine, then of course --

Madam Chairman: Because it was early, because it was filed early?

Mr. Dombek: That is right.

Madam Chairman: Earlier than the day on which payment was expected to be received?

Mr. Dombek: That is right.

Mr. McLean: Suppose you were not paid until the 20th, what would you do between the 15th and the 20th?

Mr. Beckley: I think the same response would hold for both. I think the Milk Commission, this is a hypothetical situation we are putting forward, and one which has never come before us. But my sense would be that we would wait until that 30 day period, from the first of the the month to expiry, to find out, if during that time there was settlement made, and proceed with processing the claim.

So if you are suggesting by the 20th, I think the same response would be as it was to Madam Chairperson, that we would issue an acknowledgement that we had received it and hold it until the end of the month.

Madam Chairman: If it is acceptable to the Committee, I would like to go to the Ombudsman's office for some kind of sum-up and perhaps we could collect our thoughts in this area.

Mr. Bell, would you like to add something for the record.

Mr. Bell: Before we close off, Mr. Dombek, unless it is known immediately, can you tell us that cheques that you ultimately found, issued from the producer to the these individuals, are you with me? Cheques for payments, either within, obviously not made for June, July, and August, but any cheques for payment that you are able to identify and trace, respecting these four complainants, were they issued? Were they company cheques, issued in the name of the now dissolved company or were they issued in the name of the individual who we know is now bankrupt -- processor -- I meant to say processor?

Mr. Dombek: It was by the processor, not the individual, what we understand.

Mr. Bell: The last thing, for information, members. Ms Evans has caused a bankruptcy search to be done in respect of the corporation and there is no record in the bankruptcy office of either an assignment or a petition. So in terms of the bankruptcy issue, it didn't happen?

Madam Chairman: Miss Morrison, if you could make a sum up point.

Ms. Morrison: Yes, I will try and be brief and I know everybody has been very patient and probably quite tired. I think we should try and get to the heart of this matter. And in looking at all of the things we discussed today, we have talked a lot about technicalities, most of which can go one way or another, depending on how technically you believe this statute should be interpreted. And I think there are

lots of reasons to suggest that it should be interpreted in favour of the complainants.

But I think a couple of the points which were very good ones, I am just going to reiterate. People from the Ministry have suggested that there was a fiduciary duty in the Fund, to protect the Fund. That fiduciary duty cuts both ways.

First of all, as fiduciaries, they had to inform people of the existence of the Fund. There was no question, as far as we could tell from the Ministry, that these people did not know of the existence of the Fund. When we talked to the Ministry people who dealt with these people, those people did not know the time period for filing. So the information that they could have given to these people, would be scarce, indeed.

I think if you get right down to it, we have a problem with what the Ministry or the Fund, if you like, thought of these particular producers. It is tempting to think that they didn't like goat producers, but I think that that couldn't possibly be right.

But when we come down to the arrangement, we have a situation in which people who either did not get paid or had their cheques come late or in trying to keep their business going, agreed not to cash a cheque in a week, are essentially being called liars because of that.

The Fund does not believe that these people did not have an arrangement although these people have stated very clearly, very, very clearly, that they did not have an arrangement.

The Fund has not even been able to tell us what an arrangement looked like, if there was one. Not cashing a cheque is not an arrangement, at least if it is an arrangement, and I am doing this all the time, not getting paid is not an arrangement. They have never given us any information to suggest that these people were taking money under the table. If that is what they think, that is what we should have been told.

There has been some suggestions of payment in kind, as an example a few minutes ago. If there was a payment in kind and they had the evidence that there was payment in kind, that evidence should have been given to the Ombudsman.

Lacking that evidence, it is impossible for us to see why these people should not have been paid for milk which is absolutely clear they shipped to this processor. There is no question that they shipped milk, whether it was exactly \$240 or \$247 worth, is not too much of an issue. This is a 1.9 million dollar fund. And we are talking about

preserving the integrity of the Fund against a \$3800 claim.

We cannot, in any of the information that we have received from the Ministry, understand why these claims were not paid. There is no evidence that these goat's milk producers were doing anything wrong. They were late in filing their claims but as has been pointed out by Mr. Carrothers, that late filing does not prejudice the Fund in any way.

When he asked the question about prejudice, he got the answer that if a big producer made a claim on the Fund, the Fund would go under. What kind of answer is that, about late filing? This late filing didn't prejudice the Fund in the slightest.

For the same reason, the Fund combined the late filing, what it called insubstantial figures and some notion it had of an arrangement as good reasons not to pay these people.

If there was an arrangement, we should have been told what the arrangement was. Futures and and goats milk doesn't make any sense to us. And if the section of the Act about arrangements was to prevent people from making a profit on futures and goat's milk, were they doing that by not cashing their cheques?

We have no understanding why these claims are not being paid and we ask you to support our recommendation.

Madam Chairman: Ms. Morrison, I just have a question because there has been some information brought up here as to the credibility of the complainants and accuracy of some of their information. Were the complainants, at any time, interviewed personally?

Ms. Morrison: Yes.

Madam Chairman: Dr. Lee, did you do the interview personally?

Mr. Lee: Yes, I interviewed Mr. and Mrs. J, Miss N and I spoke on the telephone to the other two complainants.

Madam Chairman: The other two. At any time, have you considered, in instances where something like an arrangement or records and information, at any time, did it occur to you that perhaps some information be taken under oath?

Mr. Lee: No, I didn't consider that possibility because in interviewing these complainants, my impression was that these were credible people.

Madam Chairman: Did you come to that conclusion when you interviewed them face to face or when you interviewed

them on the telephone or on both instances?

Mr. Lee: This is based on my interviews, face to face.

Madam Chairman: And what about the two complainants who you only had discussions with but never did interview on a personal basis.

Mr. Lee: Well, they were mostly peripheral. The main complainants were the ones I interviewed. And the issues had already been covered in interviewing the first two.

Madam Chairman: The concern I have with another one is Mr. P, who is not one of those you indicated as interviewing in person, is one that has been identified as someone who might have entered into or did enter into an arrangement, according to the Ministry, in its decision. So it may not only be that late but in addition, it was the fact that they had entered into an arrangement. And I just wondered why you did not investigate that on a one to one and in person basis?

Mr. Lee: Well, because we have documentary evidence from him concerning his so-called equity in the processor. He loaned \$5,000 to the processor and he was given a promissory note.

Madam Chairman: Mr. P did that as well as Mr. J?

Mr. Lee: No, I thought you are speaking now of Mr. P.

The Chairman: Mr. P?

Mr. Lee: He loaned \$5,000 to the processor, in return he got a promissory note and stating that he would be repaid that loan on May 30, 1981. And it was never repaid. He never had any equity or any so-called shares in the enterprise.

Madam Chairman: Well, I do not want to digress too much, did Mr. or Mrs. J also loan some money to this processor?

Mr. Lee: Yes, Mr. and Mrs. J loaned between \$3,000 and \$6,000. We are not sure of the amount and they received the 2000 shares of no par value.

Madam Chairman: So in fact, I was correct in thinking that Mr. J -- I was under the impression that only one of these complaints had loaned funds to the processor. But with regards to the arrangement, I mean did it ever occur to you to interview these people, both in person and second of all, perhaps go under oath.

I do understand that that is available from the Ombudsman's office to interview people under oath, did that

ever occur to you, as a credibility point?

Ms. Morrison: Could I answer that. I think that there is never any question that they did the things the Ministry said they did. The Ministry told us that the things that they relied on as evidence of arrangements, was not cashing cheques, taking late payments and not getting paid. When we asked the complainants, they said, yes, indeed they did that. They did the things the Ministry said they did.

The only difference between us and the Ministry is not whether these people did those things they did. But the difference between us and the Ministry is, was that evidence of, was that, did that amount to an arrangement. The Ministry never told us any other things they did, that would have amounted to an arrangement. So there was no reason to ask them questions which they had agreed to the answers to, under oath.

Mr. Bell: It is very important. Are you saying that you heard, for the first time today, indications that the minister, and I had better be diplomatic and be charitable in how I put this - and I invite Mr. Dombek to correct me if I overstate it - did you hear, for the first time today, that the Ministry considers the position of these individuals, vis-a-vis arrangement, or lack thereof, to be not credible?

Ms. Morrison: I think we thought that the Ministry didn't believe these people.

Mr. Bell: Let's get right down to it. When did you first believe or suspect that the Ministry didn't believe these people?

Ms. Morrison: When they told us that they thought that there was an arrangement. But we asked the Ministry to tell us what that arrangement was. We couldn't go out and interview the complainants, under oath, and say, did you agree to take goats instead of milk. Did you agree to take horses instead of milk. Did you agree not to cash cheques ever or sometimes or might you have these.

There were no arrangements about these three claims, these three or four months of claims. If there were arrangements, the Ministry was talking about arrangements in earlier times and the complainants agreed that they did all of the things that the Ministry said. There was no point in going and asking them anything else.

Mr. Bell: You and I could debate or others could debate whether there was a question that might have been put to somebody under oath, like, did you make an arrangement for a payment, late or extended?

Ms. Morrison: They answered yes.

Mr. Bell: Not under oath?

Ms. Morrison: They answered yes to that, not under oath, so why put them under oath to get the same answer?

Mr. Bell: They said we had an arrangement with the dealer whereby the time on which payment becomes due is extended?

Ms. Morrison: The things that the Ministry said we did which amounted to an arrangement, we did.

Mr. Bell: But they were never asked, under oath or otherwise, in order to answer or did they, whether an arrangement existed?

Ms. Morrison: If they answered that question, they answered it with what is an arrangement and we had to say the only thing the Ministry has told us is an arrangement is a delayed cheque.

Mr. Bell: Okay, I do not have any other questions.

Madam Chairman: Is there any kind of questions at this point, is there any summing up or remarks that you feel that you need to make?

Then I think the Committee would like to deliberate over this decision, and --

Mr. Dombek: May I just ask, Madam Chairman, one of our staff has to go to Ottawa, can I ask what the game plan is? Would the Committee like for us to stay and would the one staff member, Mr. Alles, I think he has a plane to catch at five o'clock.

Madam Chairman: I think it would be fine, in my view, that he go and catch his plane. I think as long as a representative is here for the decision, we will try and make that as expeditiously as possible, and if it looks as though we are not going to be able to make it today, we will certainly inform you of that.

We go in camera and we would like to ask you to make yourselves available as soon as possible. It is not like the Supreme Court of Canada, I assure you, it does not take seven months for a decision, or longer.

--- Recess taken at 4:15 p.m.

---On resuming at 5:03 p.m.

Madam Chairman: We will proceed. Thank you very much

for your patience in waiting for our decision and I would like to first say that the presentations were excellent today and I think we had some fruitful discussions on this very case, and the Standing Committee has made its decision in this matter.

In the case of Mr. and Mrs. J, Mr. and Mrs. O, Mr. P, Ms. N, the Committee has decided by motion to support the recommendation of the Ombudsman as set forth on page eight of his report made pursuant to section 22(3) of the Ombudsman's Act.

The Committee will be reporting this decision to the House in its next report with a recommendation the Ombudsman's recommendation, as set out, be implemented by the Ministry of Agriculture and Food and the Farm Products Marketing Commission, and forthwith. That this decision be implemented forthwith. And the Committee expects that the Commission will act immediately to implement this recommendation.

Mr. Dombek, could you just verify that I did include the right group in that?

Mr. Dombek: You included everybody but me.

Madam Chairman: Than I stand by the decision which the Committee has just made, so that we include everyone who is responsible.

We thank you very much for attending today. We hadn't intended to take the seven hours that it did but we are very grateful for you participating in this process.

We would be resuming tomorrow, Wednesday, January 27 at ten o'clock in Committee Room 2 and please take your books with you and either deliver them downstairs now or return them tomorrow at ten o'clock.

Mr. Dombek: Madam Chairman, if I just might.

Madam Chairman: Yes.

Mr. Dombek: I would like to thank, on behalf of the Ministry, and the Milk Commission officials, for the very fair hearing and the amount of time that you spent with this, we appreciate it. Thank you.

Madam Chairman: Thank you.

The Committee adjourned at 5:10 p.m.

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Publications

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STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

WEDNESDAY, JANUARY 27, 1988

Morning Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

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Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman
Morrison, Gail, Director, Investigations
Zacks, Michael, General Counsel

From the Criminal Injuries Compensation Board:

Scrivener, Margaret, Chairman

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday January 27, 1988

The Committee met at 10:10 a.m. in committee room 2.

Madam Chairman: Good morning. Today we are going to be dealing with the case of the complaint of Mr. B. and the Criminal Injuries Compensation Board. Dr. Hill, do you have a few opening remarks you would like to make?

Dr. Hill: Thank you, Madam Chairperson. I have a few brief remarks after which the Director of Investigations, Ms. Gail Morrison, will carry the case for us. The two cases of Mr. B. and Ms. D., represented to you today, involve decisions by the Criminal Injuries Compensation Board as to the amount of compensation due to two different victims of crime. The first, Ms. D., had her neck broken by her estranged husband. The second, Mr. B., was assaulted at the home of a person he had spent the evening with by a third party.

In both cases, the Board has agreed that criminal acts took place and that the injuries in question resulted from the criminal acts. But in both cases, the Board has decided that the injured parties were authors of their own misfortune and have therefore denied compensation. It is the Board's view of the circumstances that it is reasonable to deny compensation because of the behaviour of the victim. I have found this unacceptable. I urge you to accept my recommendations that these two victims be compensated, as well as my more general recommendation that the Board develop coherent policies to guide its decisions in cases where the victim might be seen to have contributed to his or her own injuries. Thank you, Madam Chairperson. Ms. Morrison will carry the case for us.

Madam Chairman: Thank you, Dr. Hill. And for the benefit of the Committee, it is under tab V., and there has also been an attachment. Does everybody have both, under tab U?

Mr. Bell: But the Act is under V., so that people may want to flip back and forth between U. and V.

Madam Chairman: Okay, the material is under V. and this report is under U.

Ms. Morrison: Madam Chairman, since we have two cases before us this morning against the Board, if the Committee is indifferent as to which case they would hear first, I would prefer to do Ms. D. first. Does it matter to the Committee?

Madam Chairman: It does not matter to the Board. Were you aware of this change?

Mrs. Scrivener: No.

Madam Chairman: It does not matter to you? Then I do not see any problems. Now, we are beginning with Ms. D., which is under tab W. Mr. Bell.

Mr. Bell: Ms. Morrison, can we just take inventory for a moment and make sure that we all are working on the same material in the same location? First of all, the documentation in this case is found in the Committee's brief at tab number W. Is that correct?

Ms. Morrison: It is U. in my book, Mr. Bell, but I do not have the Committee's book.

Mr. Bell: Members of the Committee, it is tab number W.

Ms. Morrison: It should be the case of Ms. D.

Mr. Bell: Right. That material contains everything except the 22(3) Report, so-called. For some reason, it was left out. To locate the 22(3) Report, the Committee members will pull out this special report of the Ombudsman, January '88, which I think is in tab U. and it's 'spirexed'. Members, the best thing to do is to locate this report and keep it separate from your brief, because you will be reviewing this document for both of the cases today and, in fact, the case tomorrow. And, in that regard, Ms. Morrison, in terms of this special report, so-called, the complaint, or the report of Ms. D. is found at page -- well, it does not have a page number, but it is the second report in the material.

Ms. Morrison: That is correct.

Mr. Bell: Which is found immediately after page nine of the first report.

Ms. Morrison: That is correct.

Mr. Bell: Okay. Now again, just for inventory, the 22(3) Report in this separate document is the thing that Dr. Hill tabled in the legislature which contains his summary of his investigation, his conclusions drawn as a result of the investigations, his analysis of the issues and finally his recommendation.

Ms. Morrison: That is right.

Mr. Bell: Now, while we are taking inventory, can we

agree that unlike the other cases that this Committee has reviewed this week and last, the Ombudsman's recommendations are on two levels. There is a specific recommendation referable to the relief sought in respect of the two -- of the individual complainant. And I guess, euphemistically, pay the person some money.

Ms. Morrison: That is correct.

Mr. Bell: We agree, item number one. There is the second level of recommendation, if I may describe it, being recommendations two and three in this case, which go to matters of policy, concern in a more general sense that the Ombudsman has with respect to the Board's practices.

Ms. Morrison: Right, and recommendation four over the page.

Mr. Bell: Well, I think that comes under the second category. It is of the general nature. And can we agree up front that it is possible for the Committee, obviously purely in the hypothetical sense, to, for example, agree with the recommendation referable to the individual, but to disagree with the other three?

Ms. Morrison: The Committee could do that.

Mr. Bell: What I am saying is you do not look at this as an all or nothing situation that if the Committee does not support the Ombudsman on any one of these recommendations, they all fall?

Ms. Morrison: No.

Mr. Bell: All right, and the other way of asking that, am I correct that these recommendations, recommendations two, three and four, are not independent of recommendation one and vice versa?

Ms. Morrison: That is correct. Although, I think the logic in agreeing with one and not agreeing with the other would have to be carefully explained by the Committee.

Mr. Bell: All right. Now, Ms. Morrison, I do not want to direct unnecessarily how you plan to present this case to the Committee. Can I make a couple of suggestions to you, however?

Ms. Morrison: Sure.

Mr. Bell: And members of the Committee, if you concur that we can proceed this way.

Ms. Morrison: Mr. Bell, Madam Chairman, before we get into that, I did deliver to the Committee earlier in the

week, the response on this file from the Criminal Injuries Compensation Board, anonymized suitably, and a number of copies thereof. I trust the members have that in their documentation? It is a letter dated January 6th, 1988.

Mr. Bell: January -- sorry, January, what?

Ms. Morrison: January 6th, 1988 letter from the Criminal Injuries Compensation Board, signed by Mrs. Scrivener, a response.

Mr. Bell: Now, we have a letter from the Premier, January 18th, and what appears to be a copy of the peace bond anonymized, but I do not believe we have ever received a copy of the letter you have just referred to. We should get that. Well, the reason we do not have it is it is already in the material. Page 64 of the material.

Ms. Morrison: Okay, it has been put into the material, is all I am asking.

Mr. Bell: Members, do you all have page 64 a letter January 6th, '88 from the Chairman?

Ms. Morrison: I just wanted to check it got into the materials.

Mr. Bell: Hold it. Sorry, maybe I have spoken too soon. No, we do not have it. We have a letter of that date under the first one. Is that what you are referring to? If you look at the first, the material referable to complainant B., there is a letter.

Mrs. Scrivener: Excuse me, Madam Chairman, I can provide this in due course, if you wish. It is not of great concern to me. I can provide this for you in a little while.

Ms. Morrison: Well, I have a copy here. It just needs to be anonymized and copied.

Madam Chairman: That would be appropriate.

Mr. Bell: So, if you could do that as quickly as possible before you finish in any event, Ms. Morrison.

Ms. Morrison: I just wanted to be sure we had all the documents.

Mr. Bell: Now, again, without directing your presentation, I suggest that the facts and the issues can be more readily followed and determined. First if you give the Committee, from the Ombudsman's perspective, a review of the relevant legislation, ie. a review of the Compensation for Victims of Crime Act, particularly the sections that the

Ombudsman addresses in his report.

You deal with the material that gives guidance to the Board in respect of what it does or should do and that includes the decision of Mr. Justice Linden of the High Court and anything else that is in the material, and having done that, would you address the facts leading up to the application and then deal with what the Board did on the application and then go to the Ombudsman's conclusions, opinions with reasons and then finally the recommendations and I think if we do it with that flow, there will be hopefully a minimum of interruption and maximum of understanding about what your position is.

Ms. Morrison: Thank you. Could I begin by introducing Miss Marilyn Stanley who was the investigator in this and the case you will hear this afternoon. She will be assisting me with those things I cannot find or cannot remember. At Mr. Bell's suggestion, I would ask you then to turn to page seven of your materials in this particular case, and we will have a brief look at the legislation under which the Criminal Injuries Compensation Board operates. The legislation in the first couple of pages contains a fair amount of legal mumbo jumbo, which is not of particular interest in this case.

You should note that the Criminal Injuries Compensation Board by section three, is composed of at least five members. These members are appointed by the Lieutenant Governor in Council and one member is appointed as Chair and one or more as Vice Chair. We are most interested in responsibilities of this Board.

This Board's responsibilities are chiefly set out at section five, which is on page nine of your materials. Essentially that section sets out the kind of things the Board is meant to compensate for. And you will note that it suggests that if a person is injured or killed by any act or omission in Ontario of any of other person occurring in or resulting from and then there's a number of circumstances which can cause these injuries or deaths, commission of a crime of violence constituting an offence under the Criminal Code.

Second in the course of lawfully arresting or attempting to arrest an offender or suspected offender. The third one for preventing or attempting to prevent the commission of an offence or a suspected offence. These are the kind of things which the Board can decide upon compensation for, injuries resulting from these kinds of things.

Mr. Bell: For future references, the Committee may note for the purpose of this case, and in fact the other one, we are dealing with a 5(a) situation.

Ms. Morrison: That is right. You will note just because it makes more sense to bring it in here, section 16 provides that an order for compensation can be made whether or not the person is prosecuted for or convicted of the offence which gives rise to the injury or death. But the Board, of course, could adjourn its proceedings pending that determination. So, that is just to kind of set the tone of the Board. It is really looking for injuries that arise out of a crime, but it has some flexibility as to whether the crime -- whether there is a conviction or not and some flexibility as to its timing.

If you go back to section five, section 5(d) sets out -- sorry section 5(d) onward sets out who compensation can be paid to, the victim, the person who is responsible for the maintenance of the victim, so if a child is the victim, someone is responsible for the maintenance and where you have a death, there is a provision for payment to the dependents, of the victim.

Section six sets out the usual time periods for an application for compensation. Application should be made within a year but the Board can extend that time, if that is appropriate. Section seven sets out the compensation, which kinds of things compensation can be awarded for. So, we have examples of the kinds of things that the Board can award compensation for, expenses actually and reasonably incurred, pecuniary loss suffered, pecuniary loss suffered by dependents, pain and suffering of the victim, maintenance of a child born as a result of rape and other pecuniary loss resulting from the victim's injury and any expense that in the Board's opinion, it is reasonable to incur. And section two is a kind of catch-all clause under the same section -- subsection two, sorry, which sets out other kinds of compensation relating to sections 5(b) and (c).

Mr. Bell: In a brief summary, what subsection two does is that if it is a crime committed while -- if it is an act of violence committed while you are either trying to apprehend somebody who is committing or pursuant, you are trying to help a peace officer under (c), what it does it expands the heads of damages that you may recover.

Ms. Morrison: That is right and in this case we are not concerned about that since none of our people were trying arrest or prevent a crime.

Mr. Bell: Yes.

Ms. Morrison: There are various sections setting out how the Board shall conduct its hearings.

Mr. Bell: First of all, though, let us just go to (a). Once an application is made and it is a section five

application, there is no discretion it has to be referred to the Board for a hearing.

Ms. Morrison: That is right. And the application is conducted by at least two members of the Board under section 8(a) or by a member of the Board for a hearing. The Board -- there are various procedural sections, the next sections, for example, if you look at 10(2), the Board can add persons as parties to the proceedings during a review and generally, the Board's process is set out by the statute.

You will note section 12 of the hearings are held in public except where, in the opinion of the Board, it is necessary to hold it in camera for specific reasons which are set out in the section, prejudicial to the trial of a person or not in the interests of a victim as determined by the Board.

Mr. Bell: Okay, it may be a red herring. Was this particular application a section ten application or a section nine -- section ten hearing or section nine hearing, or is that a stupid question?

Ms. Morrison: I don't think it is relevant. I can get the answer for you.

Mr. Bell: The only reason I ask is because of 10(4).

Ms. Morrison: It was a two member Board.

Mrs. Scrivener: It was a two man hearing, both of them were.

Mr. Bell: So it is a section ten hearing, okay.

Ms. Morrison: Section 17 is the section which we are going to be very concerned about in these two cases. Section 17 sets out the considerations which the Board must make in determining what amount of compensation or whether indeed there should be compensation at all. For our purposes, it may be useful to go through the section quite carefully now, although we will be coming back to it several times.

Section 17(1) in determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances including any behaviour of the victim that may have directly or indirectly contributed to his injury or death. So, all relevant circumstances including the victim's behaviour. Subsection two, the Board may, in its discretion, refuse to make an order for compensation where it is satisfied that the appellant has refused reasonable co-operation with or failed to report promptly the offence to a law enforcement agency.

That section you should know is there. It is not an issue today. Subsection 3 in assessing pecuniary loss, the Board shall take into consideration, any benefit, compensation or indemnity payable to the applicant from any source. This is the usual section which makes sure the people do not get double benefits. You will notice that there is, in your materials at page 21, a bill which amends this Act. For our purposes, you do not need to worry about it, but that did increase the amounts which you will see in section 19.

Mr. Bell: Is it time just to recap briefly what the Act says is required before an award can be made? In other words, in section five there has got to be a person injured or killed as a result of an act or omission in Ontario by another person resulting from any one or a combination of 5(a), (b) or (c).

Ms. Morrison: That is right.

Mr. Bell: And in determining whether an award shall be made or should be made in the circumstances, the Board has to consider the items specified in section 17?

Ms. Morrison: That is right.

Mr. Bell: All of 17, all three subheadings?

Ms. Morrison: Where applicable, yes.

Mr. Bell: Yes.

Ms. Morrison: Now, as I said, section 17 is the most important section that we have to talk about today. In section 17, stating as it does, "the Board shall have regard to all relevant circumstances" can be a matter of some difference of opinion. It is therefore, not too surprising that the court has considered the section and the ways in which the Board should apply the section, all relevant circumstances. What does that mean? And for your information, we have provided the case in which the court made that determination. It is provided for in your materials on Mr. B., at page--

Mr. Bell: 17.

Ms. Morrison: --17. Needless, to say I am not going to go through all that fine print this morning, but for your convenience, we summarized that case and its effect, in our materials in our report. The easiest one for me to find right now is page 50 of Mr. B., but it is also, of course, Ms. D.'s materials. But I will refer to page 50 of Mr. B.'s report, the same material which is contained in Ms. D.'s report.

This just gives a summary of the case and the view that the court took of the section. The case itself, just so that you get a sense of what the facts are, in case you have not had an opportunity to read it, involved a 37-year-old married woman, a Mrs. Dalton, who had visited a neighbourhood hotel and bar with two female friends. She was joined by two men at the hotel whom she recognized as regulars in the hotel, and after a evening of drinking and dancing, she left with the two men when they offered a ride home in their van.

Later in the evening, the woman was thrown from the back of the moving van onto a highway after she refused the sexual advances of one of the men. She was very seriously injured and spent a total of four months in the hospital. The two perpetrators were never found. She applied to the Board for compensation. And, yes --

Mr. Bell: I think you should tell us about the injuries that this person suffered because that is the whole reason for the decision.

Ms. Morrison: Well, I am going to read some of the decision in a moment, but I can tell you about them now if you like. Just to read from the case, when Mrs. Dalton refused to go along with the men, she was pushed out of the moving van on highway 401 near the Don Valley Parkway. She was later found unconscious on the travelled portion of the 401, was taken to the hospital where she remained for 57 days until December 17th, 1978.

She returned to the hospital again for a total stay of four months. Her injuries were ruptured spleen, which was later removed, a concussion, multiple fractures of both feet and ankles, 20 different fractures, internal injuries, lacerations to her back and entire body. She is still unable to walk normally. The two perpetrators were never found.

She applied for compensation. Her application for compensation was denied by the Board on the basis of section 17(1). In explaining its decision the Board wrote as follows: "In view of the fact that the applicant had consumed a fair amount of alcohol whereby her judgment was impaired and that two unknown alleged offenders had also had a considerable amount to drink, in the Board's decision it was imprudent to go into a van with two unknown men, inebriated men," and the Board concludes that, "the applicant was the author of her own misfortune. Therefore this application is denied". The court appeal was under section 23 of the Act, which I failed to point out to you, in which an appeal lies to the Divisional Court from a decision of the Board on a question of law.

The court reviewed the Board's legislation in an

attempt to determine what the legislation said about the Board's discretion in granting or withholding compensation. It noted that the Board was granted a very broad discretion by the legislation to make an order that it considered proper for the payment of compensation to a person injured or killed as a result of a crime of violence.

It stated that the Board exercises a discretion when it decides to make an order or not to make an order, but the discretion must be exercised in accordance with the Act and I quote from the case. "In other words, the Board cannot ignore the Act and decide cases on the basis of whim. It cannot be arbitrary. In arriving at its conclusions, it must observe the legislative guidelines contained in the statute. As long as it does so, it will not be reversed. It is only if it departs from the statutory provisions that its orders may be vulnerable to attack."

The court then went on to consider exactly this case. And in the instance of Mrs. Dalton, who had been thrown out of the moving van on highway 401, the court found that the Board had failed to apply section 17(1) properly because it had not taken into account a relevant circumstance that is the severity of the applicant's injury in determining whether it would order full compensation, deny the claim or allow a reduced amount.

The court agreed with the applicant's counsel saying that as a matter of law, the Board should have considered the advisability of a reduced award in light of the severity of the injuries suffered by the complainant. Instead the Board found that the applicant was the author of her own misfortune and dismissed her claim completely. And here, I want to quote the court again in its considering the Board's application of Section 17(1) the Court stated and I quote. "We agree that the Board erred in law in the way it purported to apply section 17(1)." This is a complex section which requires the Board to consider all the relevant circumstances including the behaviour of the victim that contributed to the injury and determining whether to order compensation or whether to make a reduced award.

The section now says that the Board shall have regard to all relevant circumstances unlike a predecessor section which stated that the Board may have regard to all such circumstances as it considers relevant. So the court was looking at the new section of the Compensation Act which had changed the discretion of the Board from 'may consider things it thinks are relevant' to 'shall have regard to all relevant circumstances' and the court found that that meant that the way in which the Board had applied this section in the Dalton case was wrong in law.

It must consider whether any conduct of the victim directly or indirectly contributed to its injury and it must

then decide whether to grant compensation, deny compensation or allow a reduced award. As long as it follows these steps, it exercises its discretion in accordance with the Act. If it fails to follow the clear directions of this section, it makes an error of law which permits this court to reverse its decision and remit the matter back to the Board for any hearing.

In this case, then, in the Dalton case, the Board found -- the court found, sorry, that the Board had failed to consider a significant circumstance which was relevant to whether it would deny the application completely or merely reduce the amount of the award. That is the court's review of this section and the court's sense of how this section should work.

Mr. Bell: Are you finished with the case, now?

Ms. Morrison: Yes.

Mr. Bell: Can I just suggest you might read a couple of other passages?

Ms. Morrison: Sorry, no, I am not finished with the case.

Mr. Bell: All right, well, then I will wait.

Ms. Morrison: In reviewing this particular case, the court said one more thing which I think you should hear which relates to the severity of the injuries in this case. The court said, "in our view, certain contributing behaviour of the claimant might be sufficient reason to deny her an award if her injuries are slight, but would not be enough to bar her if she was severely injured or killed". In this case, for example, if Mrs. Dalton had been merely shaken up by the fall from the van, the Board might well have decided to deny her compensation. If, however, she had been killed, this fact would have to be considered by the Board as a relevant circumstance.

"In this case, because the Board failed to give any consideration to the severity of Mrs. Dalton's injuries in exercising its discretion, it has made an error of law."

That sentence is very important. I would just like to read it again so that you get a sense of what the court is saying. "In this case, because the Board failed to give any consideration to the severity of Mrs. Dalton's injuries in exercising its discretion, it has made an error of law." Further, the Board did not properly consider the issue of the contribution to her injury by the behaviour of Mrs. Dalton.

It concluded simply that she was the author of her

own misfortune. However, even though her conduct may have been a cause of her injury, it cannot be denied that the two unknown men also contributed to her injury. Actually, they were the major authors of her misfortune. By going with these two men, in the circumstance, she incurred a risk, that is true. But she surely could not have expected that, as a result, she would be pushed out of a moving truck on a highway, so brutally. Although the Board did properly find that her behaviour contributed to her injury, to hold that she was the exclusive cause of this particular injury, was legal error.

Mr. Bell: Okay, and just to note the chronology, the date -- this decision is dated April the 2nd, 1982. I do not know whether that is the date that the appeal was heard or the date the court rendered the decision and of interest, the order of the Board, which is the subject of your investigation in Ms. D. is November the 16th, 1982, the same year --

Ms. Morrison: November, 1982. It is dated November 24th.

Mr. Bell: And for Mr. B., it is December '82. It is also the same year. Both subsequent to Mr. Justice Linden's decision.

Ms. Morrison: That is correct.

Mr. Bell: Okay, is it the Ombudsman's position that this case says where injuries are severe, section 17 cannot be used to deny a victim entirely some form of compensation?

Ms. Morrison: Yes, I think the court has said that. The court has also given some guidance as to what relevant circumstances or relevant information is in section 17. The court may not be saying that is the only relevant information, the severity of the injuries is not the only thing that the Board may have to take into account in using section 17, but the court clearly stated that severity of the injuries must be taken into account in applying section 17.

Mr. Bell: And do you say that the case provides that in the circumstances of severe injury there cannot be total disentitlement?

Ms. Morrison: That is right, the Board would be wrong in using the section to completely disentitle someone if the injuries are very severe. I think the court is very clear about that at the very end of its judgment, which I just read.

Mr. Bell: Okay.

Ms. Morrison: Having now seen what the Act says about the Board and having seen what the court says about the Board, and its application of section 17, I think it might be useful to go to the facts of the particular case, Ms. D.'s case, the facts in question. In order to do that, I am going to draw your attention to two places where the facts are set out. First is our synopsis which is at page one. But I should inform you that that synopsis is not an agreed upon statement of facts. It may therefore be useful for us also to look at page 48, which is a response we received to our letter notifying the Board that we would investigate this complaint which also sets out some of the facts.

I will go through the facts using both of those documents and I believe that there are very few of the facts which are in issue. In any case, I think we should set them out. In July, 1977, the complainant, a 28-year-old homemaker and mother of three, separated from her husband after a ten-year marriage. During the course of that marriage, there had been discord amongst the couple. In fact, discord is relatively mild. He had beaten her up frequently. Alcohol abuse was apparently a factor in this abuse.

At the time of the incident, and this is important, the complainant lived in a small community in Ontario. This seems like it might not be a very relevant fact, but in a small community, it is not as surprising perhaps that she is at the same kind of events as her husband turns up at. On July 2nd, 1977, she attended a party where she encountered her husband. She was there with a number of other people. They were drinking, dancing and after 2:00, presumably when the bar closed, they returned to the residence of friends, where the complainant was staying with her children and the party continued.

In the morning, Ms. D. decided to go out to the store about 9:00. She got in her car and began to drive to the store, and you will see on page 48 in the Ministry's response, their view of what happened following that. Mr. D. took the three children, who were in the house with everyone, and followed her in his car, frightening the children with his erratic driving and, at one point, going into the ditch. The car stalled when he reached the store and Ms. D. undertook to drive Mr. D. and the children back to the house.

Our information from the complainant was that she was very afraid for her children's safety. She began the drive back. At some point during that drive, Mr. D. objected to the way she was driving and in a struggle for the keys to the ignition, he grabbed her by the neck and choked her fracturing the hyoid bone in her neck. In due course, she was transferred to the hospital where she remained

approximately two weeks. She still suffers the effects of her injuries. It should be noted that when she had her neck grabbed, fracturing the hyoid bone, the car went off the road, went into a tree and she was found unconscious in the ditch.

The medical report describing her injuries stated, the physician stated, that the fracture of the hyoid, a very serious injury, used to be the common accompaniment of judicial hanging. It was such a severe injury that very few victims survived it. The physician stated that in over 30 years of surgical cases, he had only encountered one case of a fractured hyoid and that was that of the complainant's. As a result of this injury, the complainant has had ongoing problems. She suffers from headaches, stiffness of the neck, propensity to hyperventilate which prevents her from seeking employment and limits her enjoyment of life. She lives on welfare benefits in Alberta.

As a result of these injuries, the complainant made an application for compensation to the Board under the Compensation for Victims of Crime Act. That application was denied and I would draw your attention to the Board Order which is at page 36 of your materials. The Board Order briefly sets out the facts on the first page, the woman was found gasping for breath and in a stuporous condition behind the wheel of her car at the side of the road. She was taken by ambulance to the hospital and examined and the injury that I have described earlier was found.

According to the applicant's sworn testimony and I am quoting the Board order. "She and her husband, from whom she was separated, met at a drinking party on the evening of July 2nd, 1977. They spent the evening drinking and dancing together, then returned to the residence of friends with whom she was living. They continued to drink through the night". Now, that might be something that is not an agreed upon fact, but in any case, that is what the Board found. "They continued to drink through the night. She admitted they were both intoxicated. About 9:00 on July 3rd, she left the house to purchase cigarettes", and the story of the pursuit by the husband in the car follows. "He suddenly reached forward from the back seat of the car, put his arms around her neck with such force that he fractured her hyoid bone." That is the finding of the Board.

The Board heard evidence from Miss D., herself, and from the investigating officer. The investigating officer substantiated by extensive documentation, the fact that the applicant and her former husband had a long history of marital discord. As I said before, that history of marital discord is quite an understatement. She was badly beaten by her husband on a number of occasions and had to be hospitalized. She left him after ten years because she could not take it any longer.

At the time of the assault, the husband was under a peace bond at his wife's request and I have provided you with a copy of the peace bond. You will note that the peace bond just states that he is required to keep the peace. A peace bond does not say, as you might have expected it would, that he had to stay away from his wife. It just says he must keep the peace. Now, I want to quote the rest of the Board's Order quite carefully. Having considered all of the circumstances in his this case, including the past history of continuing violence, it is the opinion of the Board that the applicant knew very well the possible, indeed likely, consequences of associating with her husband while they were both under the influence of alcohol. And therefore section 17(1) which states, and we have already read it, "therefore, this application is denied".

So they applied section 17(1) to deny any compensation at all. Essentially, the same argument we saw in the Dalton case, this person was the author of her own misfortune and her application should therefore have been completely denied. The applicant had come from Alberta on a bus for the hearing. You will note under section 22 of the Act under which the Board can order certain costs, they did order costs to the applicant, her travelling to the hearing and some costs to the solicitor for obtaining hospital records and medical reports, a total of \$370.25.

The Ombudsman reviewed this decision of the Board in the light of the court's review in the Dalton case. There are a couple of differences between this and the Dalton case. In the Dalton case, the Board found, for example, that Mrs. Dalton's alcoholic state led to her being careless enough to get into the car with two men she did not know. The Board did not find in this case, that the alcoholic state of Ms. D. led her to do anything.

The Board here has only very generally said that her association with her husband was a risk she should not have taken. In taking that risk, she got what she deserved. In the Dalton case, where it was clearly found that the alcohol consumption of Mrs. Dalton had led her to take a risk she should not have taken, the court found that she should be compensated for her injuries notwithstanding the fact that she had been drinking and took a chance.

How much more so should Ms. D. be compensated, who got into the car with her ex-husband or her estranged husband to protect her children. Her children were in the car with a husband who was driving erratically. Ms D. tells us that by that time in the morning, she was quite sober. That aside, she knew that the husband was driving erratically with the children in the car. The children were reported even in Ministry documents to have been screaming and frightend and Ms. D. was afraid for the safety of her

children.

She got into the car to drive the children back to the house. They had to get back there somehow. Mr. D. also got into the car and as a result, he strangled her and broke the bone in her neck. As the doctor said, and you have been supplied with medical reports in your materials, as the doctor said, "this is a very serious injury. It is the usual result of judicial hanging and very few live broken hyoid patients are seen". He had never seen one before.

Mr. Bell: Can you just refer the Committee specifically to where the doctor says it is a serious injury?

Ms. Morrison: Right, at page 26 of your materials, the third paragraph. A fractured hyoid is a very serious injury and then he goes on to describe the injury. Notice at the end of the paragraph, "a fracture the hyoid which is a very, very hard bone is associated with considerable swelling of the soft tissue around it causing respiratory obstruction which is very often fatal before a patient reaches the hospital which is why we see very few of these in the living case". And again, the next paragraph, "I have seen only one fractured hyoid in over 30 years of surgical practices and Ms. D. is that patient".

Mr. Bell: Members of the Committee, you might also note in the third paragraph Ms. Morrison read on the second line, there is a description of the fracture, "it is so severe that very few survive it".

Mr. Philip: It is a very interesting contrast with the opinion on page 36. The first paragraph.

Ms. Morrison: "Her main complaints have been" -- the Board order says "her main complaints have been a sore neck and occasional headaches. There is no evidence of any neurological or cervical damage".

Madam Chairman: But did you not say the fracture was her main complaint?

Ms. Morrison: Those are her ongoing complaints. The Board does not, in its order, refer to the original injury and the severity of the original injury.

Madam Chairman: But, in fact, that is accurate that that is her main complaint?

Ms. Morrison: Her ongoing complaints are headache, stiff neck, dizziness.

Madam Chairman: Mr. Lupusella.

Mr. Lupusella: Just for my own benefit, would you please tell me, which section of the Act was changed after the decision of divisional court, the decision that took place which changed the discretionary power of the Board from its --

Ms. Morrison: In the decision that I read to you from, Mr. Lupusella, the change had already been made. It was an earlier court decision which had led to the change.

Mr. Lupusella: Yes, but which section of the Act is it in?

Ms. Morrison: Section 17.

Mr. Lupusella: Section 17. Now, because this particular incident took place five years ago while you have been making a presentation, you read the new section of the Act and the notes, the older section of the Act; am I correct?

Ms. Morrison: I read the section of the Act which applied at the time the Board made this decision. The Board --

Mr. Lupusella: The change which took place within a particular section?

Ms. Morrison: Yes.

Mr. Lupusella: Okay.

Madam Chairman: Mr. Bell.

Mr. Bell: Mr. Lupusella, just to finish that, the section of the Act that exists today that we are reading is the section of the Act, the identical section of the Act that the court reviewed and rendered its decision on and what the court did, in that case, except for guidelines, for the Board in particular circumstances, and I would suggest it is really limited to a case where you have severity of injury and disfigurement as opposed to diminution of award.

Mr. Lupusella: Thank you.

Madam Chairman: Mr. Philip.

Mr. Philip: On page 26, basically we get an analysis of one, at the time of the accident, it was severe, it could have led to her death and one can assume that from the description on page 26 that it would have been a very painful and stressful thing to have undergone at that time. If we go over though, to the comments on page 36, the Board is basically saying that at the present time, there is no evidence of any neurological or cervical damage and it says

that basically she is complaining about a sore neck and occasional headaches.

So from that, we get the impression that, yes, she had a very traumatic experience at the time, but five years later, there is not a great deal of suffering other than occasional headaches. Now, do you have any medical evidence that is going to tell us exactly what her present condition is as distinct from the severity of the time of the incident?

Ms. Morrison: They had the testimony of Ms D. at the hearing and her testimony, from information that she has given us, was that she does, in fact, now suffer from headaches, sore neck and dizziness. I should point out, though that first of all, the injury itself was so severe that it was a miracle she was not killed. Secondly, if you look at the order for compensation that can be given under the statute, the order does not say compensation may be awarded for whatever you have at the time of the hearing. It says compensation may be awarded for pain and suffering. She did have pain and suffering. She had, as you said, a traumatic accident or a traumatic injury. There was a suggestion in the doctor's report that it was possibly going to be necessary to do a tracheotomy to allow an extra air path for her to breathe, when the neck was so swollen from this broken hyoid bone.

There was no doubt she suffered pain and suffering. And although at the hearing she testified quite truthfully that as a result of her injury she now suffers headaches, dizziness and a sore neck, there is no doubt, I do not think and the Board had those medical reports about the severity of her injury or that she did suffer pain and suffering. In any case, just to be absolutely clear about what the Board decided in this case, the Board decided that -- the Board did not make any decision about what her compensation might have been had she not been an author of her own misfortune.

So, I do not think that I read the Board Order as saying, she should not be compensated because there is nothing much wrong with her. The Board Order says because of Section 17, whatever she would have gotten, she should not get.

Mr. Philip: However, in the court case though, the consideration is the extent of the injury, notwithstanding the fact that a person may have contributed to its own situation. And what I am trying to get a handle on is how severe is this other than an initial, very traumatic and probably very painful experience at the time of the accident -- at the time of the incident, I should say.

Ms. Morrison: It was a very severe injury. I think in the court case that I read out what the injuries were,

they were also very severe. What the court was not considering there was how -- they did say, she still has difficulty walk, but clearly she was not still suffering from all those broken bones and all that sort of thing at the time of the court case either.

Mr. Bell: Mrs. Morrison, do we agree that the issue of severity of injury is a medical issue or at least has to be examined in the light of prevailing medical opinion?

Ms. Morrison: Yes. The doctor, in this case, certainly said this is a very severe injury. Most people die from this injury.

Madam Chairman: But most people die when a tractor trailer runs over their car, but some live.

Ms. Morrison: That is right.

Madam Chairman: And sometimes they live unharmed and sometimes they live with injury.

Ms. Morrison: If they lived unharmed, they would not have been injured in this medical sense and you might have some psychological trauma or something. This person did suffer an injury and she was in the hospital and she suffered pain and she had to have emergency medical treatment. There is no doubt that she was not just shaken up, as they say, in the Dalton decision.

Note in that Dalton decision that they were quite specific about the difference between a serious injury and a not serious injury. They said if Mrs. Dalton had been just shaken up by being thrown out of the van in the middle of highway 401, which is possible, I guess. It is not likely, but possible. Then, perhaps, the Board, perhaps, and they do not even say it for sure, perhaps the Board would have been correct in applying section 17, so as to say, no, she got shaken up and she kind of asked to be shaken up by her actions. She did not ask to be hurt in the way she was hurt and I think with this case it is more so.

Mr. Bell: Are we at the crux of it now, the crux of your conclusion and recommendation that relying on the decision of the High Court, and I presume relying on the medical, certain medical evidence that is available, the Ombudsman says this was a severe injury and therefore Board, you should not have dismissed the application as you did?

Ms. Morrison: That is right.

Madam Chairman: Mr. Charlton.

Mr. Charlton: Just one other question relating to her continuing condition. It seems to me, that to some

extent the continuing condition reflects the individual severity to the individual in question. You mentioned earlier the problems with breathing and hyperventilating. What kind of medical documentation do you have on that ongoing condition?

Ms. Morrison: I do not think we have a medical report on that. We do have her letter, her original letter of complaint. I will just set out for you what she says her problems are. "I was told at the time of the accident I would have a lot of problems with my neck later on, as the years went on, and a lot of pain. I get very bad headaches since the accident. I have been told that arthritis has set in and there is nothing they can do but give me something to ease the pain. But it keeps getting worse with the pain. I was released from the hospital July 1977", and then, oh, she goes on to talk about the hearing.

I believe she testified at the Hearing about her ongoing injury. She says again in this letter, "I also hyperventilate when I get too upset or too excited. I have been rushed to the hospital even when I go out to relax. It has even happened in public". Just to complete the story, you have our report. It is in this document and it is not in your own documentation, our conclusions and our recommendations and I just want to go over these briefly because as your counsel has pointed out, they are of two different kinds. The first conclusion is that the decision of the Criminal Injuries Compensation Board -- this is on page eleven of the report.

Mr. Bell: Just wait until we catch up with you.

Ms. Morrison: Oh, sorry, those are possible ones. These are final ones. They are the same, essentially. Okay, page eleven, the decision of the Criminal Injuries Compensation Board not to award Ms. D. compensation for injuries suffered as a result of the unprovoked attack was wrong and unreasonable.

Mr. Bell: Have you told us all of the reasons for those conclusions?

Ms. Morrison: I will just -- briefly to recap the reasons Ms. D. suffered a serious injury as a result of an unprovoked attack. We believed in our review. The Ombudsman believed that the Board failed to consider the seriousness of her injury, a relevant circumstance which should have been taken into account, in considering her claim.

The Ombudsman believed that her behaviour might have contributed to her injury but for the Board to hold that she was the exclusive cause of her injury was unreasonable. Her compensation might have been reduced by the Board as a

result of her behaviour, but it should not have been a complete bar to compensation. Those are essentially the reasons that relate to the first conclusion. The second conclusion, the Board in applying section 17(1) of the Compensation Act for Victims of Crime Act is acting in accordance with a practice which is unreasonable as the Board has no policies or directives to identify the factors to be considered in affecting such applications.

The Ombudsman's conclusion here is a general conclusion in which he states that the practice of the Board in having no policies or directives to inform, either the Board decision makers or the public of the way in which section 17 will be applied is unreasonable.

Now, those who are familiar, for example, with the Workers' Compensation Act will know that the Workers' Compensation Board has a vast numbers of policies and directives which inform the decision of the Board in relation to compensation for work-created injuries. It is the Ombudsman's view that some policies and directives ought to be developed in relation to section 17. So, he concludes that it is unreasonable for the Board to an unreasonable practice for them not to have such policies and directives.

Madam Chairman: Mr. Philip.

Mr. Philip: Rather than compare it to the Workers' Compensation Board, are you aware of similar legislation in any other jurisdiction and if so, are there specific directions that could be pointed out toward as a guideline if this recommendation were accepted?

Ms. Morrison: We have not obtained guidelines from other provinces although certainly that would be available to implement such a recommendation. It would be available to look into those possible guidelines elsewhere.

Mr. Bell: Ms. Morrison, what more do they need than Linden's decision?

Ms. Morrison: Well, with respect, Linden's decision does tell you what you ought to do about the severity of injuries, for example. It does not tell you very much else, or what it does tell you is not, it does not tell you all of the circumstances under which it might be unreasonable to completely bar compensation.

Mr. Bell: Well, except I am not sure if anybody else in this room or Solomon could identify all of those. But just hold on, the Act says you can only appeal on an error of law.

Ms. Morrison: Right.

Mr. Bell: And Linden clearly says as long as they have considered all of the facts, it is not an appealable. You may disagree with the decision they have arrived at, their conclusions flowing from that evidence, but you cannot overturn it. So just taking the evidence, why do you need policy and -- why do you need policies and directives on that part?

Ms. Morrison: Well, I think that all of the facts, for example, in the Dalton case had to include severity of injury. What else does all of the facts include? It seems to me that guidelines suggesting what are the appropriate factors to take into consideration, not necessarily saying only these, but that you must at least advert to these would be very useful both for people who are seeking compensation, so that they can say to themselves, these are the things that the Board will look at, but also so the decisions that are taken in regard to these different kinds of injuries arising out of different kinds of conditions will be consistent.

Mr. Bell: Why cannot have opinions or decisions with reasons, available to all who are interested, serve that purpose?

Ms. Morrison: With respect, not everyone can read full decisions with reasons. Lawyers can. Lots of the people who are applying to the Board are not necessarily applying with counsel. It seems to me that the public ought to be informed in the way in which the Board exercises its discretion, just as the Board members themselves should have a consistent approach.

Madam Chairman: Mr. Bossy.

Mr. Bossy: Just to clarify that point that I am sort of lost on the basis of when the incident happened when the guy put his arm around the neck and then what happened. Because we have doctors' reports here that are quite conflicting because if you look at Doctor L., I believe it is, making a statement in this first paragraph, "having been involved in a motor accident that morning". Then he goes on in the second paragraph describing what happened to the lady and then it says, "at that point the car came to a halt and two women in the car following came to her help".

We go back to page 33, which is a report from a Doctor K. and there it says, "the ambulance had been called to pick her up at the site where she was apparently in a motor vehicle accident. The car apparently struck a tree", so that we do not seem to have had that because the car came to a stop, there is conflicting reports what is the actual police record of this?

Ms. Morrison: Right, the record that you see at page

33 is a hospital report, I believe, a doctor's report from having seen her in the emergency. When they picked her up at the site of the accident, she could not talk, so they did not know what had happened to her at that point.

Mr. Bossy: But either she was not sitting against a tree.

Ms. Morrison: That is right.

Mr. Bossy: Or was it sitting along the road as some indication?

Ms. Morrison: Well, the car apparently struck a tree, but it is clear and it is agreed by both the Board and our office that the injury she suffered was suffered as a result of the strangulation. That is an agreed upon factor.

Mr. Bossy: I can see that there would be conflicting statements whether it is a motor vehicle accident or whether it just was happening because of fast driving and then the car came to a stop along the road?

Ms. Morrison: No, it is clear that it did not happen. We are agreed that it did not happen. The husband was convicted of assault in the case.

Mr. Bossy: Well, I do not question that part. I do not question. It is -- what was it? Was it a car then after the happening of the arm around the neck, did that car then hit a tree or did it come to a halt along the road or this is the conflicting reports I read on different pages.

Ms. Morrison: I think in the Ministry's letter at page 48, you get the, sort of general, agreed upon facts in which the Ministry says, "at some point, he objected to the way she was driving and in the struggle for the keys to the ignition, he grabbed her by the neck and choked her, fracturing the hyoid bone in her neck. In due course, she was transported to the hospital".

Madam Chairman: Mr. Johnson.

Mr. Johnson: I am having problems with 17(1). This legislation was drafted in the minority government in 1980 and your recommendation from the Ombudsman that the Board established guidelines, these Board members, in applying section 17(1). My reading 17(1) would indicate that the Board has excused their decision making to pretty well follow what the legislation sets out that they are to give consideration to all relevant circumstances including any behaviour of the victim. They may have directly or indirectly contributed his injury or death. Now, I would submit that if that is not satisfactory to the Ombudsman, then maybe the recommendation should be -- the legislation

should be amended.

Ms. Morrison: I think we do not quarrel with the legislation in setting out the general power in the Board to include in its consideration the behaviour of the victim. What we do suggest is that that general power should maybe be not as a legislative matter, but as a matter of Board policy set out in more detail so that there is some sense of exactly how that behaviour will be taken into account. The court, in the Dalton case, for example, found the way the Board took the behaviour into account to be inappropriate and I think that what we are suggesting is that a set of general guidelines would mean that the Board took it into account in the same way in similar cases.

Mr. Johnson: I would submit that having seven mini committees to draft legislation, that members of that day, drafted it deliberately, so that the behaviour of victims would be considered.

Ms. Morrison: I agree. I agree, and certainly and if the change should be a legislative one, that is a different matter. But our feeling, our recommendation is that, yes, they should take into account the behaviour of victims. All we are asking for in guidelines is a set of guidelines which would make the way they take that behaviour into account consistent in different cases of the same kind. So that, for example, if a person has consumed alcohol, that would be or will not be, taken into account depending on, for example, whether the actual consumption of alcohol caused the person to do the thing they did, or whether someone else was involved in the injury.

We feel that there ought to be having reviewed the Board decisions as you will see in our report, we reviewed a lot of the Board's written decisions and we felt there was some inconsistency in the way in which the Board applies section 17 and we felt that guidelines would inform the Board's decision making in such a way that it would be consistent. That is the purpose of the recommendation.

Madam Chairman: Any further questions? Mrs. Scrivener.

Mrs. Scrivener: Thank you, Madam Chairman.

Madam Chairman: Sorry. Were you finished?

Ms. Morrison: I was going to deal briefly with the Board's response, but we can do that afterwards. Mr. Michael Zacks of our office is going to deal with some of the legal questions that are raised by the Board's response. But it perhaps might be better if we hear from Mrs. Scrivener first and then deal with that question.

Madam Chairman: I think we have to identify the legal issues first. I think that would be better.

Mrs. Scrivener: Well, it would be helpful for me to know what it is I am responding to. If I could hear it now, it would be helpful to me.

Ms. Morrison: Okay, we can go then to the Board's response on January 6th, 1988 which has been handed out to you. Your report makes four recommendations, so the response says. And it sets out the Board's comments on our recommendations. The first comment suggests that the Board is authorized to vary in order for payment of compensation by section 25 and that the only way in which the Board's decision is not final is if there is an appeal to Divisional Court on a question of law. They suggested there was no order for payment in this case within Section 25 and therefore, Section 25 does not give the Board the power to vary its order and, therefore that it is unable to comply with our first recommendation. I would like Michael Zacks to address that question.

Madam Chairman: Michael --

Ms. Morrison: Zacks, Z-A-C-K-S.

Madam Chairman: Thank you.

Mr. Zacks: In reviewing this legislation we were concerned with the Board's response on this point, because of course, if they are correct then, they are unable to implement the recommendation as we have indicated but our feeling is that the Board does have a power under section 25, which is their power to reconsider, to vary the order that they made in this case. The Board's actual decision is worded as an order and it is an order without -- for no compensation. My understanding of the Board's position is that unless there is an order for some amount of money, be it a thousand dollars or one cent, they do not have any authority to vary the order. We feel that is an interpretation that results in an absurdity because it prevents the real spirit and the intent of this very remedial legislation from being fulfilled.

To use the Board's argument, it would actually prevent an applicant who comes up who does not get an order, who gets an order for no compensation, who comes up with new evidence, which is information that the Board can consider, from coming back and asking the Board to review his new evidence which that person was unable to get in time and appeal would not be available because it would not be a matter of law and the real injustice would be done.

But the converse would be that an offender, the individual, the husband, who choked the complainant in this

case, if an order had been made for some amount of compensation, he would be able to come back and recommend and request the Board of the new evidence to make no compensation against them and we feel that the wording of this legislation, if it is seen, if it is interpreted in a broad, remedial way as is directed by the Interpretation Act, that the wording 'vary an order for payment of compensation' can easily include an order for no compensation at all. And what we are arguing is that that is the way this section should be interpreted and not in the very narrow way that the Board has interpreted it.

I would also like to make another comment about how the Board is interpreting this problem. As a general rule, this Board, which is a quasi judicial body, is unable to reconsider its decisions. This is called principle of *functus officio*. But there are several exceptions to this rule and the Ombudsman encounters its response often times from various tribunals, but I would like to point out that there are exceptions. One of the exceptions is section 25(1) which is a statutory power of reconsideration. Another exception, of course, is that there is an appeal, which it is too late to bring into legislation now or judicial review.

In the past, as Mr. Bell knows, we have had a so-called friendly application for judicial review where the Board, at the time, which was the Residential Tenancy Commission and the Ombudsman and the complainant agreed that no one would object to the court application and that was, in fact, done and the complainant received the remedy that he was seeking at the time.

There are also different, other ways or techniques of allowing the Board to reconsider its own decision. And that is where the error that the Board makes is seen as a nullity. It nullifies the decision. It is our submission that the law is very clear on this point that tribunals, such as this Board, do have a power to reconsider their own decision where they are in agreement that their decision is a nullity. And it is based on the arguments and the submissions made by Ms. Morrison, in terms of the Board's failure to consider very relevant facts and though that error in itself on two grounds renders its decision in nullity.

On the first ground, they breached a statutory requirement of section 17, which under the Dalton decision, direct the Board to consider those factors. On the second ground a basic common law principle. They fail to apply relevant considerations in the exercise of their discretionary power and in law that renders the decision a nullity.

Madam Chairman: Mr. Bell.

Mr. Bell: I love asking this question because I get asked it all the time. What is your authority for that in specific terms, because if I follow it, what you are saying is where there is law already out there, that says if you fail to do the following, that decision is wrong in law and we will set aside, rather than require people who follow thereafter in same circumstances to go to the Divisional Court. The law gives the tribunal in question the authority, if you will, to recognize its own error and to take appropriate steps. I think that the Committee would be very interested in what you have specifically in the way of authority.

Mr. Zacks: Well let me just preface my statement by an observation that I made when I was researching this. There are very few cases because, as a rule, tribunals often don't like to criticize themselves and admit that they have made a mistake. So, you do not see it too often in reported cases. The usual technique is for one of the parties, who feels that an error has been made is to go for a judicial review. But there are a few cases where tribunals, having recognized that an error has occurred on their own initiative, on their own motion, review the matter and hold a new the hearing.

The leading case in this is a case called Posluns. It is a Supreme Court of Canada decision, P-O-S-L-U-N-S, against the Toronto stock exchange. Perhaps a very good statement of this is contained in the Ontario Encyclopedic Digest of Law, Third Edition. I will quote, with the Committee's permission, from page 3-153. "When a decision has been reached in a manner contrary to the rules of procedural fairness or natural justice, where there has been a failure to comply with statutory procedural requirements, the breach can be cured if the decision-maker involved holds a reconsideration of the whole matter with a fair and open mind and corrects the errors of natural justice or other deficiencies which occur at the first hearing".

Mr. Bell: Have you got the case?

Mr. Zacks: The Posluns case?

Mr. Bell: Yes.

Mr. Zacks: Not on me.

Mr. Bell: Did the Toronto Stock Exchange not have the authority by its own regulations to reconsider?

Mr. Zacks: The case did not turn on that point. It was determined on a question of the rules of natural justice. My recollection of the case was that one of the Posluns, when he was called to appear, was under the

impression that the inquiry would be involving other members and would not affect his own activities. When he attended that, the matter turned into an inquiry for his behaviour and it turned into a type of disciplinary proceeding. And there were objections made by counsel and the stock exchanges decided on its own initiative. I am not aware if they were rules. The case did not turn on that point, to my recollection.

Mr. Bell: Maybe you can arrange to get us the decision, because, with respect, I think it does, for our purposes, turn on that point. If the stock exchange was permitted, as a matter of its own policies and procedures, to reconsider, then all the court is saying is, look, do not put us through the hassle of a judicial review application. You do it yourself in these cases. That is not our situation. The Board here says we cannot reconsider because we do not have the legal authority to do so.

Mr. Zacks: We have got the decision here and we can pass it on to you, but as I say, it it is not my recollection. The other statement --

Mrs. Scrivener: Excuse me. If you are keeping a xeroxed copy of that, may I have one as well?

Mr. Zacks: Certainly.

Mr. Philip: I am lost on that one. As I read 25 --

Mr. Zacks: I am outside of 25 now, but we can go back to it.

Mr. Philip: But as I read section 25, it gives the power to reconsideration, if the judgment was no compensation, then would 25 not give the power to say some compensation?

Mr. Zacks: Yes, that is the first argument that I am making, a broad, liberal, large interpretation of section 25, which gives the Board the authority right now, without looking at any other matter that I have spoken about, after the initial comments, to reopen its hearing and receive new evidence to consider, as the statute says, "not only new evidence, but any other matter that the Board considers relevant such as the facts concerning the severity of the injury and the degree of contribution by the claimant".

Mr. Philip: I am not sure whether it is you or John Bell that has lost me. Maybe, can you run by the points you were making again?

Mr. Bell: Well, we are not talking now about section 25. I mean, there are a lot of interpretations available in 25 over the magic phrase "vary an order for payment" as to

whether before you can vary anything there has to be an order for payment or whether an order for no payment is included. I do not want to get into that today. But, what Mr. Zacks is attempting to do now with the benefit of legal authority is to demonstrate that notwithstanding what the legislation says, tribunals of this nature have the inherent jurisdiction where a decision they have previously rendered is legally invalid or legally a nullity to correct their own mistake. And he cited the positive decision as the first authority for that. And rightly, will give copies to the Board as well to the Committee, and in my recollection of Poslun, however many years ago I read it, is that there did not appear to be an issue whether the stock exchange could, of its own motion, correct something that it had done and if that is a provision was available to the stock exchange, then I would suggest that it is not -- that case is not a lot of assistance, but Mr. Zacks has a lot more to tell us.

Madam Chairman: Mr. Johnson.

Mr. Johnson: Mr. Bell, just for clarification, you are suggesting that a tribunal may have the power to make the change if they see that they made a mistake to correct an error?

Mr. Bell: Well, Mr. Zacks is suggesting that and he is trying now to persuade the Committee to that point of view.

Mr. Johnson: Okay, but if the first instance, would the tribunal not have to admit, or at least accept the fact, that they made a mistake?

Mr. Bell: Or be told that they did.

Mr. Lupusella: Again for my own benefit, my ideas, are we talking about quasi judicial tribunal?

Mr. Zacks: Yes.

Mr. Lupusella: And we talk about that and how come, the appeal tribunal of the Workers' Compensation Board is final?

Mr. Zacks: Well, it is not. They can reconsider on their own initiative as well. There is a provision in the Act they can.

Mr. Lupusella: If new evidence is set before them?

Mr. Zacks: They have guidelines in how they exercise their discretion.

Mr. Lupusella: But that is special for the new evidence, the tribunal is special to find out as to whether

or not the evidence is new evidence as presented before them is relevant; am I correct?

Mr. Zacks: You are correct. The only other comment I wanted to make on this point is again this section, the Encyclopedic Digest, which is a 30 odd volume compendium of the law in Ontario, is a statement that follows on to this question of nullities. And I am quoting now as follows: "Of course as noted already in relation to judicial or quasi judicial authorities, if the initial consideration is tainted by a breach of the rules of natural justice, or other procedural deficiency, the matter can generally be reconsidered. This principle also justifies a reconsideration of any matter for certain other types of nullifying error or present such as a lack of jurisdiction, asking the wrong question, taking into account the irrelevant factors and point, in this case, and failure to take account of relevant factors". And the quote goes on.

But, the point I am making is that really these are alternative positions. The first position that we are advocating for your consideration, is that the statute itself, section 25 on its clear words permits the Board to reconsider this case and implement the Ombudsman's recommendation. If the Board -- if the Committee feels that is a proper interpretation, the common law itself permits the Board to reconsider, because their decision is, in essence, a nullity.

Mr. Morin: Can this Committee tell the Board to apply section 25?

Mr. Zacks: Well, the Committee can make its recommendation to the Board and the Board --

Mr. Morin: But it does not have to go to the court?

Mr. Zacks: No it does not have to go through the court. That is the point of the approach. You do not have to go to court. If it is a nullifying error, if the tribunal feels that it is an agreement or is told to do it and accepts that advice that it is a nullifying error, it is opened to that body to reconsider the matter afresh in an unbiased way.

Mr. Philip: As a result of this, your recommendation could be, or the possible result could be, if it is implemented that the Board could reconsider weighing what was allegedly not to consider, namely the severity of the accident, weigh that and still say, we do not feel the compensation is justified. That could be a possible outcome of your --

Mr. Zacks: The short answer is yes. But the full recommendation that we have made is, in essence,

reconsidered grants, grant compensation because of the admonition of the Dalton case.

Madam Chairman: Mr. Bell.

Mr. Bell: Your 25 argument that you say that if you do not interpret 25 as including an order for no payment or dismissal of the application, that it renders an absurd result. How do you get around the last phrase in that section which says that what the Board may do in varying an order is by increasing or decreasing the amount ordered to be paid?

Mr. Zacks: Or otherwise. And prior to that statement, vary the terms of the order, increase or decrease the amount to be paid or otherwise and the otherwise would be pay something.

Madam Chairman: Well, I think that their 'otherwise' might mean pay a lump sum or periodic payments.

Mr. Zacks: Or that can be referred back to the terms of payment, as well. But otherwise it is a very broad catch-all phrase. It could not include what you are suggesting. It possibly could include the word 'workplace'.

Madam Chairman: Yes Mr. Charlton.

Mr. Charlton: Yes, I have a question for Mr. Bell. In the context of what is being raised here about whether or not you have to go to court, I go back to the discussions we had with you at the outset before any of these hearings started, when we were discussing the role of this Committee. Now, am I not correct that, in fact, the legislature has the authority of a court and therefore a recommendation of this Committee supported by the legislature is the same as an order from a court to the Board?

Mr. Bell: Well, there have been other Boards, quasi judicial and otherwise, who have come before this Committee who have had recommendations and been subject to recommendations ultimately adopted by the legislature and they have accepted and implemented those. The Workers' Compensation Board, for example, which has and still has a privative clause notwithstanding its reconsideration authority.

The regional, the Residential Tenancies Tribunal, for example, is another one that has, that stated that it did not have authority to reconsider and there have been previous recommendations. My view is that the legislature who adopts recommendations of the Standing Committee and it does so by, pursuant to a debate and by an order that has got some obligation and we can hear from the Board. Mr. Zacks, can I just ask you one more thing?

Mr. Zacks: Sure.

Mr. Bell: In both of these cases, they were orders for payment of moneys made. They were supplementary orders and they are specifically orders made under section 22.

Mr. Zacks: That is right.

Mr. Bell: I guess what I am asking, are those orders, in the Ombudsman's opinion, included in the phrase "an order for payment for compensation"?

Mr. Zacks: Well, we tossed that around for a while in the office and in fairness to the Board, I think it would be stretching it to try to build an argument based on payment of costs.

Mr. Bell: Except that there are lots of decisions or lots of courts that say that an order for costs is an order for compensation. It is an order in debt for compensation indemnifying, successful or otherwise.

Mr. Zacks: I agree. But there is a clear statutory -- I do not want to argue for the Board, but there is a clear statutory authorization for them to pay costs totally distinct from the payment of compensation, and the Board very clearly made this payment under that provision.

Mr. Bell: Do they then not have any authority to vary an order for costs? Once they make it, is it fixed for all times?

Mr. Zacks: I think so, unless in their new rehearing, they wished to make new costs, if it is subject to a -- if it is a payment for additional costs based on a rehearing provision. On reconsideration they could pay additional costs, but I do not think they have the authority to change the order for costs. On a further point, there are two other basis by which a tribunal, such as this Board can change, can reconsider their decisions. I am not going to go into them, but just to underscore the fact of this concept of final binding decisions is not one without exceptions. There is at least four or five different approaches that the clerks have taken to allow tribunals to reopen the matter and settle for whatever reason and pursue them.

Mr. Bell: Has your office done a memorandum on this
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Mr. Zacks: Well, there are a couple of other documents floating about, yes.

Mr. Bell: Would they be useful to the Committee?

Mr. Zacks: Yes, I could provide ---

Mr. Bell: Would you also provide them to the Board?

Mr. Zacks: Before I do that, it just occurred to me that it is our internal legal memorandum. Perhaps you should be asking Dr. Hill for that. They are his documents.

Mr. Bell: Well, Dr. Hill.

Dr. Hill: Yes, we will provide those documents.

Mr. Zacks: I do not want to be overstepping my bounds.

Mr. Bell: Maybe if it is possible to have them before lunch, Mrs. Evans and I can look at them over lunch and anything from that that will assist the Committee, we will do so.

Mr. Zacks: Yes, I can have them for you by then. They are rather lengthy, but I will try to get them for you.

Mr. Bell: If there are any other questions.

Madam Chairman: Well, I just have one with respect to the Ombudsman Act, which was 15(4) which says "nothing in this Act empowers the Ombudsman to investigate any decision, recommendation, act or omission, with respect of which there is under any Act, a right of an appeal or objection or a right to apply to a hearing or review on the merits of a case to any court or to any tribunal constituted by or under any Act," and it goes on. And there is a rule of appeal with the Compensation for the Victims of Crimes Act; is there not?

Mr. Zacks: Yes.

Madam Chairman: And that is to the Divisional Court?

Mr. Zacks: There is an appeal right on the question of law to the Divisional Court.

Mr. Morin: In this case?

Mr. Zacks: Yes, in any case that the Board decides that there is -- if the party believes that there has been an error of law, they have the right to appeal to a Divisional Court.

Mr. Lupusella: So, why are you asking this Committee to make a deliberation on the merits of the case when the courts --

Mr. Zacks: The appeal rights law expired.

Mr. Lupusella: I beg your pardon.

Mr. Zacks: The right to appeal has long expired for these complainants when they came to us, there was no longer any right to appeal.

Madam Chairman: What is the limitation on the appeal?

Mr. Zacks: If I recall correctly it is fifteen days.

Madam Chairman: Mr. Bossy.

Mr. Bossy: Thank you, did you now state, there were other cases that were reopened even though the time had expired on whereby it was jointly agreed?

Mr. Zacks: Sorry?

Mr. Bossy: Where the parties jointly agreed that --

Mr. Zacks: I am not aware of that. There may be.

Madam Chairman: Mr. Bossy, I remember Ms. Morrison referring to the fact that you should make your complaint for injury within one year, but that can varied to the Board. You will apply to the Board if you have injury, but if you do not do it within the time period of the Board, the Board may agree to extend that period to one year or two years, whatever time. Could you check on that just very briefly, something for you to look into, the appeal period. I would be interested in knowing that.

Mr. Zacks: From my understanding it is the rule, the appeal period and the rules of practice. I think the appeal period to the Appeal Court is fifteen days from the date of the decision.

Madam Chairman: Thank you, any further questions, Committee. No.

Mr. Zacks: I'm sorry, 30 days.

Mr. Bell: Well, it depends on what it is, though, does it not? Because there is no limitation period on a judicial review.

Mr. Zacks: This is not judicial review.

Mr. Bell: Yes, okay.

Mr. Zacks: The rules of civil procedure have a 30 day limitation period to appeal a decision on the

administrative tribunal it is rule 61.04(1), so it is 30 days and my recollection was that 30 days had long expired by the time the complainants came to us.

Madam Chairman: Thank you, any further questions, Mr. Bell?

Mr. Bell: Has your office been faced with this position of a tribunal before, ie. there is nothing in our legislation that permits us to alter our decision and I do not attribute this to the Board, but for hypothetical, yes, we agree that our decision should be changed.

Mr. Zacks: I cannot recollect offhand that a tribunal that is actually agreed and said, but for the matter being final, we do it, but there are a number of tribunals that come back and say we disagree with you in any event. We can do it. But in the majority of those cases, not all of them, our views were based on factual concerns rather than issues which go to nullifying the decision. So, we have not had an opportunity to bring forward this type of issue to the Committee to date. This is the first time.

Ms. Morrison has informed me about the Residential Tenancy Commission issue and in that case, there is an anomaly in the legislation, it is the actual members who sat on the first Board, the first panel, and heard the appeal to claim to us to review the same matter. That has been changed now and in the new legislation, but the difficulty was that one of the panel members have died and accordingly, they were completely functus, and the Attorney General and the Ombudsman and the Commission all agree, that we were in a difficult spot and we were currently discussing judicial review and actually quash the decision, sent it back to the Commission. So, it is not exactly analogous in this case. It is something new all the time.

Mr. Bell: So what you did in that case though is the parties, ie., the Board and the complainant consented to --

Mr. Zacks: That is right.

Mr. Bell: Consented to an order in the Divisional Court setting aside the original decision and sending it back. And in that case, the Divisional Court did agree to permit itself to be used in that way. I say.

Mr. Zacks: That is right. That is a possibility here but I am suggesting there are other techniques, not as cumbersome and time consuming or expensive to achieve the same result.

Madam Chairman: Thank you very much.

Mr. Lupusella: I have a supplementary question.

Madam Chairman: Mr. Lupusella.

Mr. Lupusella: I think this Committee has been called to make a judgment to decide in the merits of the case on the two sections of the Act, Section 17(1) and Section 25. That is the argument which you are making now, in Section 25. Are we supposed to make both judgments on the two sections before the merits of the case is going to be decided by this Committee, or should there be a common decision?

Mr. Zacks: Well, the merits of the case and the reviews of the section 17 are essentially the same, I believe in how you -- whether you agree with us on section 17 and the merits of the case are one issue. There is also another issue of really whether the Board -- would agree with the Board's position as they get to put forward their view of what the merits are that they probably have to exercise discretion and depending on how you characterize the issues for yourselves and the question, the positions I put forward may not be relevant for you to decide at all, but you get to hear from the Board.

Mr. Lupusella: Thank you.

Madam Chairman: No further questions? All right, thank you, very much, Mr. Zacks. Are you complete at this point, Ms. Morrison?

Ms. Morrison: Yes, thank you.

Madam Chairman: Thank you very much. We are going to try it again. Mrs. Scrivener, would you like to make a few opening remarks?

Mrs. Scrivener: Thank you, Madam Chairman, I am very pleased to be here and to participate in this exercise and, as a starter, if you will indulge me, I would like to ask Mrs. Manly to put some information and material around for the Board for the Committee members which I think will be of assistance to them in understanding how our Board operates and give them the kind of flavour of what a Board member undergoes in terms of approaching the hearing. And all of this material that we are putting out, this material which has been received previously by the Ombudsman, there is nothing in this material which has not been not circulated to the Ombudsman prior to this.

Madam Chairman: Ms. Morrison, do you have any problems with us getting --

Ms. Morrison: I have not seen it, so it is hard for me to say.

Mrs. Scrivener: It is our correspondence and also it is the new copy of our Act, a copy of our brochure, which I thought members the Committee would like to have for their file, a copy of an application form in case they ever have a constituent who needs to have a form forwarded to our office. They will at least have one on file for their use with a guide to applicants which is the kind of thing that is just a routine with us, but I thought the Act is the amended Act, not the one that you have in your file folder, but for your purposes, the only change in this Act compared --

Mr. Bell: We have got a problem with this material. This material is not anonymized.

Mrs. Scrivener: Well, I would submit with the greatest respect, sir, that there is no anonymity at this point in time.

Mr. Bell: Perhaps you will permit me to finish and then you can respond in any way you see fit.

Mr. Scrivener: Surely.

Mr. Bell: Members, there is, as you know, because there is a confidentiality duty imposed on the Ombudsman that anything that he obtains as a result of his investigation cannot be disclosed by him unless he considers it necessary to do so for the purpose of making a report. He has made a report in these cases and he has decided that it is not appropriate to disclose the names of the individuals for good and sufficient reasons.

The Committee has, since 1976, endorsed that duty of confidentiality and you have had the experiences of it over the last two or three days. You are assiduous to ensure that the identity not be revealed through this Committee's process. I commend that. I remind you of that and I commend that position to you for this particular case for the Committee to receive this material in the way that it is prepared, would involve the Committee, quite frankly, in an unfortunate and inappropriate disclosure of the person's name.

A person does not waive anonymity by complaining to the Ombudsman's office nor is that anonymity lost by the virtue of a 23(3) report. Now, Mrs. Scrivener, I think you wanted to respond to something that I had said.

Mrs. Scrivener: Yes, sir, I endorse your position wholeheartedly. Confidentiality is something which is fought for and protected at a constant, ongoing concern to my Board. It is a matter that is under, shall I say, constant onslaught from a number of sources, solicitors, the media, bless their souls, law students, everybody would like

to have access to our files to do some research or whatever, whatever, and we refuse in sundry.

And as a result of this, and until we had clarified our position, in terms of what was available and considered public information and what was not considered public information, under the Freedom of Information Act, we had a certain correspondence with the Ombudsman's office about the release of information, because they were asking to see the content of files as placed before our panel members prior to hearings. This has since been identified and done.

Having said all of that, and I assure you that we go to great lengths to protect the confidentiality of our files, because in some cases, not in these files, but in some cases, you have very sensitive psychiatric reports which may -- the information which may not have been shared with the patient, you have Revenue Canada reports and things of this sort, which cannot be public in any way and which are the private information relating to an applicant, so, I stress to you, my awareness.

Having said all of that, you may imagine that I was startled when I received calls from the media a week ago Monday asking me about details of this case, reading off to me relevant information straight out of the material which was on my desk at that time, asking me for the relevant Board orders and our Board orders are public information and so on.

So, I sent Board orders and the correspondence with the Ombudsman's, which is not in our files but in my personal file, to the press gallery because apparently the reports on these two cases had been released in the press gallery and I was being asked for additional information and if I have it and it is in the public domain, it is my duty, really, then I have to release it and that is what I did do.

Mr. Bell: Mr. Scrivener.

Mrs. Scrivener: And I did not know that any of this information had been disguised the way it was being presented to me was and then this person said and that person said and so forth and so forth. And one person said to me and how do you spell his name, and I spelled it, because it is a French name and I thought perhaps he had a problem.

Mr. Bell: Well, Mrs. Scrivener.

Mrs. Scrivener: So, it is, the confidentiality is blown. That is my point.

Mr. Bell: Well, I think the Committee would be interested in who blew it and whether the Committee wants to

continue to participate in it. Did any member of the press gallery that you spoke with -- first of all, can you confirm that the discussion with the press gallery representatives were after the Ombudsman filed his reports in the legislature?

Mrs. Scrivener: They were calling me in response to material which had been circulated to them from the Ombudsman's office.

Mr. Bell: Can you tell us, from your logs or from your notes, if it was on or after January the 15th?

Mrs. Scrivener: Yes, it was a week ago last Monday afternoon.

Mr. Bell: All right, did the individuals with whom you spoke from the press mention either of these two complainants by name?

Mrs. Scrivener: I do not recall.

Mr. Bell: All right.

Mrs. Scrivener: One person said to me, how do you spell his name.

Mr. Bell: All right, but we can agree whoever used or raised whoever else's name first, after the discussions the press knew the individual's names?

Mrs. Scrivener: Yes, because they had our Board orders.

Mr. Bell: Are you suggesting that the Ombudsman's Office disclosed the names of the individuals to the press?

Mrs. Scrivener: I have no knowledge of this.

Mr. Bell: All right, but we do know that the press got some information from your office which discloses the people's names?

Mrs. Scrivener: Yes, I sent the Board orders and copies of my correspondence with the Ombudsman's, as you have it on your desk now, because it is very relevant and it is public information. I have no means of denying -- refusing to provide information which is public information.

Mr. Bell: Mrs. Scrivener, were you aware before today, that the Ombudsman reports these matters and the Committee deals with these matters anonymously?

Mrs. Scrivener: No, I have never seen it in all of the information which is sent to me. All of the names were

used in everything. And if you will look at the copies of my correspondence with the Ombudsman, you will see that all of the names are used and when I had my assistant prepare indexes, we indicated the names of the individuals who corresponded and so forth. That is -- I just thought this was a standard procedure. I had no idea that you were using these initials.

Mr. Bell: Madam Chairman, may I suggest, I have thumbed quickly through the material referable to Ms. D. and fortunately, there is very little that is in here that you have not seen before. You may not already -- you may already have. I have got a practical suggestion. If possible, I would like you to give it back and I would like, if possible, at the noon break and I might suggest an extended noon break, if Mrs. Scrivener's staff and Dr. Hill's staff could get together very quickly, identify the documents that are not -- new to the Committee but not new to you, get them anonymized as quickly as possible and give them to us at 2:00.

Mrs. Scrivener: I can tell you right now to save it for everybody, a lot of time, what you have and I was going to be discussing this because as I said, I wanted to give the flavour to the Board. The long document is the file which we placed before Board members. The Ombudsman has had this.

Mr. Bell: Miss Scrivener we know that and frankly I do not --

Mrs. Scrivener: That is at the back.

Mr. Bell: I do not want the Committee to talk about it now, Mrs. Scrivener, until it has had have an opportunity. Let me tell you where I am going. I do not know what the consequences are of the disclosure. I frankly do not want it to be a debate before this Committee. If there are any consequences, I do not want this Committee to be part of it. If there had been disclosures by other means, for other reasons, that is water under the bridge but I do not want my client participating in something that has already occurred that may have been unfortunate and I will not put it on a higher plane.

So, members forgive me for appearing to be sensitive to this on your behalf, I have got a practical suggestion on the table. I think it will permit Mrs. Scrivener, after lunch, to deal with this material in a full way, as she is obviously prepared to do. It just would not have the names of the party.

Mrs. Scrivener: Mr. Bell, I think that this is a matter which bears discussion with this Committee. As you know, I am a former member of the legislature and it seems

to me that a presentation from the Ombudsman and a presentation from me should come to this Committee in the first instance. That would be --

Mr. Bell: I do not disagree with that.

Mrs. Scrivener: That would be my approach as a member of the legislature. That was always my experience.

Mr. Bell: I do not disagree that. We are just talking about whether people's names should be disclosed during this Committee's proceedings and this Committee has a twelve-year history of saying no.

Mrs. Scrivener: Yes.

Mr. Bell: And I am giving 1988 advise to say continue to say no. There have been too many unfortunate circumstances of people being disclosed by proceedings and I do not want this Committee's proceedings to be added to that list.

Mrs. Scrivener: I would like to advise that they have been disclosed, the confidentiality is blown.

Madam Chairman: But I do not think we have to continue. I think as long as we continue in our vain. Do we have any objections from the Committee to continue with the particulars of this case?

Mr. Philip: May I propose that immediately this file be handed back to the clerk and that Mr. Bell's recommendation be accepted by members of the Committee?

Madam Chairman: Any objections. Seconded.

Mrs. Scrivener: I think that members be permitted at least to keep the printed material. I do not think we want this back because they would like to have it.

Madam Chairman: I have taken mine out.

Mr. Bell: So long as there is no misunderstanding of what that means. Only give us back --

Mr. Johnson: Why do we not give everything back and they can give it back to us later.

Mr. Bell: But this is just a direction. Only give the Committee back what it does not already have anonymized; do you understand?

Ms. Morrison: Presumably only documents which we have seen at some time earlier, others would have to be discussed before they were given to the Committees; is that

right?

Mr. Bell: That would be consistent with the Committee's ruling of no new dumping of evidence.

Mr. Lupusella: There is no problem with that.

Mr. Bell: No, of course not.

Madam Chairman: I think we should maybe take an early lunch, so that you will have an opportunity to review the documents and then, Mrs. Scrivener, that will give you an opportunity to present everything before you and it is just our time of resuming. We will resume here at 2:00 in this room. Thank you very much.

The committee adjourned at 12:10 p.m.

STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

WEDNESDAY, JANUARY 27, 1988

Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Johnson, Jack (Wellington PC) for Mr. Pollock
Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Criminal Injuries Compensation Board:

Scrivener, Margaret, Chairman
Giuffre, Vincent P., Registrar

From the Office of the Ombudsman:

Morrison, Gail, Director, Investigations

From the Ministry of the Attorney General:

Lockett, Peter W., Deputy Director, Crown Law Office, Civil

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, January 27, 1988

The Committee met at 2:07 p.m. in committee room 2.

Madam Chairman: The attorney just pointed out, Committee Members, there are two letters that should be inserted in Mr. B's file, which is under Tab V and a revised agenda to accommodate our changes today and what we will be doing tomorrow, just because we have changed it a number of times. I think that is all that was handed out at that point.

Mr. Philip: Will we get through by Thursday?

Madam Chairman: I think so. I hope so. Yes, I hope we will. If we do not, we will find some more... Okay?

Mr. Philip: Just if we are not, we should give Members enough notice if we are going to have to sit over on Friday.

Madam Chairman: I do not think we would sit Friday.

Mr. Philip: No. I think we will be finished. I expect to be finished. I am not available Monday.

Madam Chairman: We do not have next week's time slot, so we cannot sit next week.

Okay, Mr. Bell?

Mr. Bell: Mrs. Scrivener, have you and your colleagues been able, with the representatives of the Ombudsman, to anonymize those documents, which the Committee does not already have and, if so, maybe we could start again and you could provide copies of same to the Committee?

Mrs. Scrivener: Madam Chairman, the Ombudsman's Office have indicated to us which are the duplications and which are the omissions and I have looked at them all and, basically, I think the Committee is swamped in paper and I am not going to add to their woes. So, I think we will just let it pass for the time being.

On this point, I have to say, never having been before this Committee before nor having had an opportunity to observe it on other days because I usually am engaged in other committee work, I was unaware of what my access to the Committee might be.

We telephoned from my office to the Clerk of the Committees to ask if there was briefing material available

to the Members and were told that there was and a copy of that material was sent to me and I think we had received that -- I have forgotten -- about Friday of last week.

I was totally unaware of the presentation made to the Speaker of the House and this morning, I saw for the first time the copy of that. I gather, from Mr. Bell, that is probably what was placed in the press gallery, but as I say, I was unaware of it.

I have never seen it. And I would judge that its content is really contained in the voluminous file that I have on hand and which was the one I was going to distribute to Members.

My file, in some respects, is slightly more fulsome than the Ombudsman's submission to you, but basically, I do not think there are matters of any great import beyond the fact that there were maybe 50 letters backwards and forwards on each case. So that gives you some idea of the extent of the correspondence and the length of time it has taken to cover.

I think the only time I was ever really astounded at any part of this correspondence was when we went from a letter from myself to Ms. Stanley in the Ombudsman's Office in response to a request from the Ombudsman.

That letter was written on October the 20th, 1986, having months, months, and months passed and I heard not a word and then, on a visit into the Ombudsman's Office, I discovered that this file was open and pending and they were wanting additional information from me, additional relevant information.

I had no idea that this was even a point of issue and it was, thus, when I learned that the Ombudsman has a system whereby he keeps files open for great lengths of time, whether or not any correspondence is ensuing and until you receive some words otherwise. That is where it rests.

Mr. Philip: Mrs. Scrivener, may we have a page reference for the letter that you are referring to?

Mr. Bell: 58.

Mr. Philip: 58?

Mrs. Scrivener: Well, my letter was written on February the 3rd, 1987.

In this regard, I would like to add one further note. I would like to tell the Committee that our Board has made a very real and sincere attempt to be cooperative with the Ombudsman's Office.

We have responded to their requests as best we could with our limited facilities, and I say that from envy because when I visited the Ombudsman's Office, I discovered he had a staff of 148, which makes our small 20 look really quite puny.

To that end, I would inform the Committee that since May 1985, our office has dealt with nine complaints raised by the Ombudsman, six of which have been settled quite easily between either himself, in terms of his nonsupport of an application or our adjustments, as the case may be.

There are actually, at this point in time, only three outstanding; two of which, you have before you and one, which remains unresolved. I think that is not a bad record when you come right down to it.

Madam Chairman: If I may just interrupt for a minute.

Mr. Philip?

Mr. Philip: May I just go back to your comments about the letter because I guess I just do not quite see the point you are trying to make.

The letter of September the 4th, from the Ombudsman, Marilyn Stanley, the Investigator--

Madam Chairman: This is page 56.

Mr. Philip: This is page 56. --states that they are "...considering what further action..." So they have taken your evidence that was contained in your letter of August the 26th.

Then, it is only about five weeks later that they write back and say that they want to meet with your people to discuss the matter.

It would seem reasonable, if they are looking at all of your arguments, that five weeks would not be an unreasonable delay.

I run into constant instances where Ministries can take months to reply to the Ombudsman and a five-week delay in considering the arguments and doing follow-up investigations to find out whether or not there is a need for further meeting with you people or, in fact, closing the file in your favour would not seem to me to be an unreasonable delay; indeed, I find --

Mrs. Scrivener: Oh, I am sorry. I have given you the wrong date. September the 22nd, 1987; that is the letter in which the reference was contained.

Mr. Philip: I am sorry, okay.

Mrs. Scrivener: I am sorry. It is my letter--

Mr. Bell: At page 75.

Mrs. Scrivener: --on September 22nd.

Mr. Philip: 75, did you say?

Mr. Bell: 75.

Mr. Philip: Okay. So you are saying there is a delay from September the 22nd, when you responded to Dr. Hill to December the 17th, at which time they presented their position to you?

Mrs. Scrivener: I...

Mr. McLean: Does it really matter when that position was presented? I am here to hear evidence of this case. We heard it this morning from the Ombudsman and I would like to hear the evidence now from the inter-Ministerial investigations --

Mr. Philip: In fairness, though, the accusation, I think, seems to be made that the Ombudsman has somehow delayed the case.

Mr. McLean: That has no bearing in my mind.

Mr. Philip: Well, it has in the Committee's mind, when it referred to Ministries that acted without reasonable haste - and I think Mrs. Scrivener has made the point - that here seems to be an instance where the Ombudsman has not acted with reasonable haste and whenever that kind of thing happens, then the Committee always wants to know why there was a delay.

That is a reasonable question for any one of us to ask and I would ask the--

Mr. Lupusella: Point taken.

Mr. Philip: --Ombudsman if he can explain the delay.

Madam Chairman: Yes, Mr. Lupusella?

Mr. Lupusella: Well, at the very beginning, when this issue emerged about delays of the Ministries with the Office of the Ombudsman, it appeared that there was a common sense decision made by the Committee Members that we are going to address this problem when the Committee will write a report, so it does not make any sense to raise this issue in each individual case.

Mr. Philip: The only way in which you can come to grips with it is to deal with each individual case to see whether there are legitimate reasons - and sometimes we have found them - as to why there has been a delay or whether, in fact, there is some kind of problem in either the operations of the Ombudsman or certain Ministries, in dealing with it.

I would simply like to know, and I ask the question again, which is in order: Can the Ombudsman explain the delay?

Mr. Lupusella: You are out of order because a decision has been made in relation to this particular issue.

Mr. Philip: There is no decision that has been made.

Mr. Lupusella: A discussion was been made by this Committee that we are going to address this issue and we are going to write a report and it appears that we are raising this issue on each individual case.

Madam Chairman: Thank you, Mr. Lupusella, and thank you, Mr. Philip.

Perhaps, when you do your closing remarks, Ms. Morrison, you can refer to why, in your opinion, there was a delay, if any, and we will just leave it at that point for now.

Ms. Morrison: Thank you.

Madam Chairman: Mrs. Scrivener, could you now, perhaps, present what you believe to be the evidence in your case, if we can get right into the meat of the matter?

Mrs. Scrivener: Madam Chairman, as I mentioned to you earlier, I had some few preliminary remarks and my first is in dealing with the Act.

You have already had a discussion of the Act with Ms. Morrison, but if you do not mind, I would like to give it to you from a slightly different viewpoint.

If you recall, before lunch, I circulated to you a lengthy piece of documentary material and without breaching any confidentiality, I will just show it to you.

This is the kind of file -- some of them are exceedingly thick -- which is placed before our Board Members before they go into a hearing.

This file contains, in the first instance, the application of the individual applicant, the acknowledgement of receipt from our Board, and then it proceeds to develop all the content with the applicant's consent, so you have

medical reports and so forth.

If the case appears to be contentious, then we will ask for an incident report and one of our investigators will examine persons who were present. If there was an offender known, he will seek to get some identification of what was proceeded there. If the offender has been charged, he makes a note of it because it is significant within our Act and so forth.

Our Board Members are expected to have this read and to be prepared and to have full knowledge of what is in the content here before they go into a hearing, so that they can ask intelligent questions and understand what the applicant is going to tell them. Because many times, we have applicants who come before us whose first language is not English and we always offer them interpreters, if they wish; but also, they are nervous and uptight and we do our very, very best to get them to relax, so they can talk to us in an informal way about what happened.

It is through our questioning of them, the extent of their injuries, the extent of their suffering and their trauma that they have gone through, that we can get an evaluation of the mark that this incident has made upon them and their life and try to evaluate how we can best compensate them and provide materials for them.

The first thing our Board has to do, basically, is consider who is the victim, what is the eligibility of the the applicant and so you zoom to section 5, which has been discussed with you; the first section, of course, being "the commission of a crime of violence," and that is a very specific phrase.

The second one is the historic one. Our Act was pre-dated by an earlier Act, 1968, which was the Law Enforcement Act, and that was specifically designed to assist persons who had come to the aid of police.

That, of course, was very limited and quite inadequate in terms of the thrust that the government of the day wanted to have and so this Act was brought in, in 1971, was debated very broadly and extensively by all Members of the House and I am pleased to say it had a unanimous approval by Members of the House.

The Act that you have in your file books is, I think, a copy of the Act, which was in use until the present Act came in, in November 5th, 1986, which had certain amendments to it, but for your purposes, there are no changes or adjustments that will affect your deliberations on these two cases.

So, the Board Members look at the first sections of

5(a), (b) and (c), and then they proceed to examine who is the applicant and what is his relationship; that is, his status.

From that point, he moves into the the next question, which arises naturally, which is section 7; that is, the injury and the heads of damages.

I guess the section here that receives the heaviest use has to be 7(d), which is "pain and suffering". That is the operative for us to be able to compensate anybody who has been injured as a result of violence.

We move on, then, until section -- well, I can take you through all the other sections, but I do not really think you are going to be interested until you get to 17. 17 is a very big and important section in our Act and one that we examine in this way: If any part of 17 appears to be at least an issue to be contemplated in evaluating an application, the first thing that the sitting Members have to consider is 17(2): Was the applicant cooperative with the police?

They are talking about a reasonable cooperation and that is a fairly elastic thing. But we have had applicants before us who refused to talk to the police; who, in effect, wanted to take the law into their own hands; who would not assist with identification of an offender; who, in one instance that I sat on, gave the police misleading information as to the location of an occurrence and the police said to us afterwards, it meant that they spent more than 24 hours chasing all kinds of leads, which led nowhere and were totally frustrated in their efforts. A person like that was denied, I can tell you.

So, 17(2) is the historic section, again, cooperation with the police.

Mr. Philip: Would you agree it does not apply, though, to this case?

Mrs. Scrivener: No, no. I am only taking you through the Act in the way our Board Members think.

Then we come to 17(1), "...all relevant circumstances..." That is a very heavily used phrase and that is a section which is considered and debated in terms of what are the circumstances, what is the nature of the injuries and how do they weigh against other extenuating or contentious matters.

That is where, I guess, if you have the wisdom of Solomon, it helps. Our Board Members are human beings, like us all, and they do their very best from their knowledge and experience.

Moving from 17(1), (2), and (3), we go to section 23, which is the right of appeal:

"Subject to section 25, a decision of the Board is final expect that an appeal lies to the Divisional Court from any decision of the Board on any question of law."

That is a pretty final-sounding clause, but in this Act, you read things together because if you become familiar with the Act, you understand that one thing does relate to the another.

23, by its preliminary clause, subject to section 25, does relate then to 25. So in the case of the two applications you have before you today, both of those were applications which were denied; that is to say, an application for compensation for an award was denied.

So then, when you read section 25, you read:
"The Board may at any time on its own initiative or on the application of the victim, any dependent of the victim, the Minister or the offender, (may) vary an order for payment of compensation in such manner as the Board thinks fit..." and so on and so on.

Now, setting aside the contentiousness of the issue you have before you right now, I have to say that this section is probably one of the most important we had in our Act. It is an exceedingly humane and compassionate section.

In the case of persons who have received compensation from the Board, it permits them to come back and many times in our Board orders, we identify the fact that they may want to come back and we will be considering their applications again, but they may come back to us with requests for further assistance through the means of an order for variation of their original order.

Madam Chairman: If I can just interrupt for a moment.

Yes, Mr. Morin?

Mr. Morin: Just by curiosity, do you have access to legal counsel, who helps you go through all that? Do you have anyone to advise you as to the interpretation of the Act, itself?

Mrs. Scrivener: Yes. I can, from time to time, apply to the head of the Crown Law Office, Civil, in the Ministry of the Attorney General.

Ms. Morrison: Somebody would come forward and help you out?

Mrs. Scrivener: Basically, we have several lawyers who sit on our Board, but most of us who use it are very well conditioned to the way the Act has to be used.

I am not suggesting that word in total, but we do get to know through use and through the Act, itself, through the appeals, which have gone through the courts at different times, what the points of law are.

As well, we have meetings of the Members of the Board from time to time, both informally and formally in which we discussed interpretation of the Act in relationship to special cases and so forth and --

Mr. Morin: They will do the research for you; for instance, if there are cases that are quite complex, you would find out if there were any precedents or any rulings or any cases similar to the one that you made a study?

Mrs. Scrivener: Sometimes, one will know of something like that. We regard every case on its own merit because no two are the same, human nature being what it is.

Madam Chairman: Mr. Philip?

Mr. Philip: I want to go through a couple of statements that you have made on two sections.

First of all, section 17, and the operative words that I am concerned about are:

"...all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his injury or death."

When you referred to "all relevant circumstances," you said, if I am correct, "...including what is the nature of the injury..."

So I take it that you admit that under section 17, in addition to dealing with what behaviour the victim may have directly or indirectly contributed to the incident, that you also will, as part of all of the "all relevant circumstances," take in whether or not it was a gross and heinous or a very severe or painful injury that they experienced as a result of the injury?

Mrs. Scrivener: Um-hmm (affirmative).

Mr. Philip: Okay. Then I take you then to 23; 23, you superimposed 23 and 25 together. 23 says that, basically, the decision is final unless there is a matter of law, in which case you can take it to court. But then 25 gives you the exception, that the Board may, notwithstanding the

right of a person to go to court on a matter of law, may also, if the Board sees fit, the Board may, in fact, vary an order of payment of compensation.

Now, is it your contention that an order not to pay is, in fact, an order of compensation?

Mrs. Scrivener: No. A denial of an application for compensation is just that, a denial. You cannot vary a compensation; you cannot vary nothing of nothing of nothing. Half of nothing is still nothing.

Mr. Philip: Well, or zero plus two is two, so if you are going to vary, then, you are varying up or down, obviously, and you cannot vary down from zero, but you can vary up from zero.

Mrs. Scrivener: One can order, vary an order for payment of compensation and our orders are called that; they are called "Board orders".

Mr. Philip: So your position is that under section 25, if the order was not to pay, that that would not allow you to open up a hearing of nonpayment or to rehear, if you want, even if there was new evidence that became available to you?

Mrs. Scrivener: I can hear it, but if it has been denied, it is not legal.

Mr. Philip: But if there is new evidence, then, you cannot, under 25, deal with it?

If you decided, if you decided that Mr. X was not entitled to any payment, at all, to zero payment, and then new evidence came before you, you would not, in your opinion, under 25, be able to open up the hearing again and review it?

Mrs. Scrivener: No. A decision of the Board is final.

Mr. Philip: So it is tough luck, then, if new evidence comes out after the the decision?

Mrs. Scrivener: I do not know. I do not recall ever having somebody apply, you know, on the basis of new evidence, in that sense, evidence that had never been submitted.

Mr. Philip: Is that not the thrust of the Ombudsman's report; namely, that he feels that under section 17, that you, in fact, did not take into account sufficiently, the evidence or the severity of the medical problem caused by the injury and if that is the case, would that not be new evidence or, perhaps, changes in circumstances?

Mrs. Scrivener: I am sorry. In a short space of time, when I come around to a discussion of the issues, I would like to go into this in greater depth. If you wouldn't mind setting your question aside to that point--

Mr. Philip: Fine.

Mrs. Scrivener: --it would be helpful to me because I would just like to get through some nuts and bolts before we get into the in-depth discussion.

Mr. Philip: Sure, okay.

Madam Chairman: Mr. Charlton, is your question on the point of the section or can we --

Mr. Charlton: Yes. We can hold my question, as well.

Madam Chairman: That is good. Perhaps, if you could continue?

Mrs. Scrivener: Thank you, all right. We have done section 25. Then, just before I leave the discussion of the Act, I would like to draw Members' attention to section 26, which deals with subrogation.

In this day and age, when we are all very interested and concerned in the Victim-Witness Program, when the Minister of Justice is announcing a new Bill, C89, which will permit the Crown to assess offenders in terms of their financial worth, in order to see if they can reimburse a victim, I think subrogation is an important part of our Bill, of our Act, and is one that has been exercised over a great period of time in connection with many, many offenders, relating to applicants who have come before us as victims.

I just thought I would let you know that it is there. It is an important principle, which we all uphold. I have to say with regret, it is not a very lucrative source of funding, but it is there.

Now, I have touched on the matter of confidentiality and I think you understand how strongly we feel about this matter in our Board. It is certainly one of the important issues that I had intended to raise to you, but I think we have all sort of been exposed to that.

Madam Chairman, I have some issues that I would just raise to the Committee for their consideration and then I will move right along into the discussion of the application before you.

The first has to do with preparation of Board orders. This is the legal instrument by which payments are made.

Payments for compensation are made to applicants and our Board orders are something that require a very considerable amount of writing skill and comprehension. They have to be able to stand up in a court of law. They do not always, but mostly, they are supposed to.

They are always changing and I like to think that we are changing and evolving and improving all the time; in other words, the Board Order that you might read, coming from the Board in this past year might be quite a bit different to the Board Order that you would have read ten years ago because sometimes the thrusts change, sometimes attitudes and manners and mores change with the times.

In June of 1985, we had with us for a day Mr. Justice Horace Krever, who was then with the Divisional Court and who spent the time discussing with us our Act and the preparation of Board orders and what he, as a jurist, felt were the important factors in the preparation of a Board Order.

He discussed this with great competence and skill and it was an exceedingly helpful day to our Members, but since he started the ball rolling at that time, it has been an ongoing process ever since.

When we have new Members of the Board, they go through a training period when they sit first as observers with the senior Members, then they sit as Members, but junior Members of the panel, but are participants in starting to take their share of orders to write, but their orders are then scrutinized, usually by a senior person.

We have had Members, who have been working on Board Orders, who have written and rewritten and rewritten as many as five times in order to express what they thought was being said at the hearing and what were the issues that were raised and the approaches that had to be resolved.

I only tell you this sort of thing because I think it reveals a kind of dedication and a concern for accuracy and a very real attempt at doing things properly, so that the applicant understands and the public at large understands these are public documents, which are circulated to the media and which are made available on request, as I have indicated to you, which may go before a court or to the Ombudsman or whatever, so we try very hard to be sure that our Board orders actually reflect what happened.

Sometimes they are a little terse and that has to do with the judgment of the person who is writing because sometimes when you have been listening to an exceedingly lengthy hearing, you realize afterwards when you start to write it, that a lot of the material was detail that was not necessarily entirely relevant to the issues which arose.

My second point is the Board's concern and understanding re matters concerned with family violence, sexual assault, child abuse.

In the material, which you have received from the Ombudsman and especially in the case before you, there is reference to Board attitudes in this regard and to that end then, Madam Chairman, if you would indulge me, I would like to circulate three letters, which are opinions from other persons on this matter.

They do not mention any names that would have to be scrubbed by the Members of the Ombudsman --

Madam Chairman: Is this on point?

Mrs. Scrivener: Pardon?

Madam Chairman: Is this to do with this case?

Mrs. Scrivener: Yes, it has--

Madam Chairman: In what particular documents?

Mrs. Scrivener: --because this matter was raised in the case, the hearing you have before you, the Board's attitudes in terms of family violence.

Madam Chairman: I do not know -- and if I may, just before Mr. Bossy -- I do not know that this is pertinent. You know, I think here, we have family violence. It has been noted and I am sure your Board has dealt with family violence a great deal.

If it is for information purposes, as to the attitude of the Board, I think the Committee is willing to accept that the Board is more than capable of dealing with issues of family violence.

Mr. Bossy?

Mr. Bossy: Yes. My point, Madam Chairman, was the fact that we are not here really to judge the credibility of the Board.

Madam Chairman: Exactly.

Mr. Bossy: And I believe that we are here to deal with the issues, and the determination that we must make is on the basis of why you denied the case.

I believe that is the most important fact that we can get from you, is why you denied on the basis of what has transpired, on all the evidence that came within that case.

Mrs. Scrivener: Well, you see, I had only, in preparation, the opinion of the Ombudsman, which you have had circulated to you and which has, in effect, some derogatory remarks to make about the Board's attitudes in terms of family violence. And so I have received letters from Virginia Adamson, the Acting Provincial Coordinator for Family Violence Initiatives from the Ontario Women's Directorate, concerning the Board's attitude in this regard, from--

Madam Chairman: I do not think--

Mrs. Scrivener: --Loretta Doyle, a Family Therapist, who is in Sault Ste. Marie and from Elliott Larman, Chairman of the Social Action Committee and Cheryl Regehr, Sexual Assault Team of the Mississauga Hospital on behalf of the Ontario Association of Professional Social Workers.

Madam Chairman: Excuse me, Mrs. Scrivener. I do not think there is anyone on this Board that challenges, at all, the ability of the Criminal Injuries Board in its ability to deal with this issue.

I think all of us believe that the Board, itself, is an excellent Board and it is commendable the way that it does its activities and the fact that this is your first time before this particular Committee, I think, is noted.

What we would like to know is with regards to this particular case. I think now, with your excellent review of the Act that we have been given today, for those of us who have not had an opportunity to go over it before, we understand that.

I think the issues that we really would like to be dealing with are the ones specifically to the denial in this case and, also, any arguments, legal or otherwise, you might have with respect to the Board's position in re-hearing on varying an award and its ability to do so.

Could you please focus on those two?

Mrs. Scrivener: I am sorry. I thought that I was here, I was given to understand that I was here to respond to the statements made by the Ombudsman and these are all items that are contained in his report to this Committee.

Mr. Bell: Well, Mrs. Scrivener, if it will assist, the reference in the Ombudsman's Report, what you are referring to is a study done by some law professor, wherein some conclusions are derived as for the relative sensitivity or insensitivity of your Board to issues of family violence.

I think I could speak for the Committee that the

Committee does not consider that to be a relevant issue and really does not --

Mrs. Scrivener: And the charges made by the Counsel for the applicant, they are not relevant?

Mr. Bell: Well, we are not aware, from the Ombudsman's report, whether any of those charges... In the hypothetical, if anybody's legal counsel charged or alleged that type of insensitivity, that is not an issue that this Committee considers to be relevant to deciding whether, in the circumstances of this and the other case, for that matter, whether a compensation award ought to have been issued. So you need not feel, from this Committee, a requirement to so respond.

Mrs. Scrivener: I see. All right.

Mr. Bell: But, nor do you need to be concerned that this Committee is going to endorse that point of view or comment on it for its own purposes.

Mrs. Scrivener: Then my next item that I want to raise has to do with the Ombudsman's concern about policy guidelines and, to that end, I would refer you to two letters. One was written on February the 3rd, 1987.

Mr. Bell: Just hold on.

Mrs. Scrivener: And in that letter, addressed to Dr. Hill from me, I said: "Just as an aside," --

Mr. Bell: Mrs. Scrivener, maybe if you could permit the Committee to catch up to you.

Mrs. Scrivener: Oh, surely. All right.

Mr. Bell: February the 3rd, '87?

Mrs. Scrivener: Yes.

Madam Chairman: Page 61.

Mr. Bell: Page 61, Members. Just a moment. Okay. Does everybody have that one, page 61 of Ms. D?

Mrs. Scrivener: Yes. You will see that in the second paragraph, there is a reference to the content of a memorandum and then, flipping over to page 2, I said:

"Just as an aside, the Memorandum as it relates to each of the cases cited seems to be unduly preoccupied with references to the "policies and practices" of our Board. As I explained yesterday, the Act is our policy, and establishment of generalizations or attitudes as they

apply to alcohol, homosexuality, assault, or whatever, would be abhorrent to the application of a truly humane process. In other words, I think Board Hearings on such a basis would become bureaucratic in nature, rather than compassionate as they are at present."

I made similar references, then, in a second letter on April 27th, in which the matter had been raised again and I reiterated our concern about establishing the Board in an inflexible position because it has been our approach that the Board be humane, to try to meet each situation as it arises and that flexibility is an important part of the attitude.

To set down rigid guidelines relating to alcoholism or whatever and how we deal with such cases, inevitably leads to such rigid restrictions that if somebody does not fit the guideline, then they get hurt and then this inevitably leads to a "meet list", which we do not have and do not want to have because we do not consider that that is the right approach, at all, to anything.

Madam Chairman: The Committee acknowledges your responses to any contentions made by the Ombudsman's Office, but Ms. Morrison did not bring that into issue today.

Mrs. Scrivener: Well, it is part of the thing I thought I was supposed to respond to in both of these applications.

We come now to, I just want to the raise the Dalton case, since it has been raised as an item in terms of both of these applications.

I think, you know, in point of fact, the Dalton case here is not applicable. I will go into a much greater discussion in terms of this, of what happened to this poor lady, but where -- the Dalton case dealt with a woman who was caught in circumstances, which ultimately became beyond her control and suffered very, very grievous injuries and the extent of her injuries was a factor in the Divisional Court's decision.

I think that in these instances before you, and I will identify why, this case is not applicable. I have to say, though, that in terms of the Dalton case and of all of the kind of argument that flows, the one item which has not been raised here today, but one which is relevant, is the acceptance of responsibility; the requirement of the person to accept responsibility for his own action. This is not something that can be set aside lightly.

In a very recent case before the Ontario Court of Appeal, an appeal was denied on the grounds that a man's conduct was undertaken in spite of warnings from other persons to him and in spite of a gross intoxication and he

was seriously injured, but the appeal was denied on the grounds that he did not take responsibility for his own actions.

I think that this is a factor which has to be considered and which is one which is recognized in similar Boards across this country.

Mr. Philip, and others have asked: "What do other jurisdictions do?" I can tell you. This is the report of Criminal Injuries Compensation in Canada. It is the last one, 1985, but it does not change that much from year to year. It is prepared by the Policy Programs and Research Branch of the Department of Justice.

As you may know, there is a federal-provincial cost sharing agreement, which is in effect between the Federal Government and the jurisdictions all across Canada and in the Territories, which provides for transfers in support of awards paid to victims of violence.

To that end, that agreement contains certain things, which have been negotiated over the years, but actually, they all go back to 1971, '72, '73; whenever the local jurisdiction established its system of compensation for victims of crime, but they all subscribe to some common things and these are, and let me just read:

"The federal-provincial cost sharing agreements contain a number of other basic conditions designed to ensure that certain minimum standards are met by existing programs. In brief, these are compensation to be paid when there is injury or death as a result of another's crime or as a result of lawfully seeking to enforce or assist in the enforcement of federal laws."

So you see, those are basic tenets.

"Compensation not to be given as a rule if the victim brought about his own misfortune."

It is not just an aberration by the Province of Ontario. It is common to all of the jurisdictions across the country.

Mr. McLean: Madam Chairman, on a point of order on that very point, could you indicate to me why Ms. D should not be compensated? You are talking about this across the province. How would you relate that to Ms. D? Why should she not be compensated?

Mrs. Scrivener: I cannot give you my personal opinion, sir, because I did not attend that hearing. I did not hear the evidence and I was not privy to the information concerning it until so many years later, but if you want me to move right into that, I would be pleased to do so.

Madam Chairman: That would be appreciated, thank you.

Mrs. Scrivener: I have just two more issues that I want to take up when I deal with this.

If you review the Board order, which was written at that time, the panel did examine the evidence of this lady's serious injuries. They had all of that material before them and it was material which you had in your hands very briefly this morning.

That material was considerable and so on, but they also had the subsequent evaluations of this lady's physical state, six or seven months later, which indicated that she continued to have some breathing difficulties and dizzy spells.

They also had then to evaluate the evidence presented to them by the investigating officer and he was on the scene. He did see the car, he talked to the witnesses, he talked to the children who were in the car and to another adult who was in the car. He talked to all of these other persons and ultimately, talked to the applicant, herself, I think within a day or so of the accident.

All of this information was reflected, then, in that report, which he provided and which was contained in the material before the Board Officers.

The police also apparently indicated to the investigating officer the fact that this family had a very long history of discord, that there had been many, many calls to that household; that, generally, the discord was characterized, as it says in the Board order, "...by extensive drinking episodes, violent assaults and frequent separations."

It is a fact that the applicant, in this regard, was actively seeking a divorce from her husband at the time of the assault and because she was concerned for the safety of herself and her children, had given sworn information to establish a peace bond and that peace bond, as I understand it, was issued just a couple of weeks before this incident.

She was obviously aware, aware of his propensity for violence, aware of many things. She had choices to make. She made her choices and I think on the basis of that, taking it all in balance, I believe that is why the Board arrived at this decision.

I cannot give you a closer evaluation than that because this is not something that I have discussed with the Panel Chairman and would not. I cannot discuss in detail the content of the Board Order. It happened a very long time

ago.

Madam Chairman, to move on again, there is the matter of the right of appeal and this has been raised already. I will raise it again at this point in time and read you the Ombudsman Act, section 15(4).

Mr. McLean: On a point of order, Madam Chairman.

Madam Chairman: Yes, Mr. McLean?

Mr. McLean: You just said you could not discuss it in detail; it was kind of confidential, the order that was issued? You just said you could not discuss it in detail?

Mrs. Scrivener: No. I am the Board Chairman.

Mr. McLean: The Board order, the Board order?

Mrs. Scrivener: The Board order is not something that I can discuss in detail because I do not know this of my own knowledge.

Mr. McLean: I believe we have a copy of it.

Mrs. Scrivener: Beyond the fact that I read the order as you read it, but I cannot -- you said to me: What are the reasons?

I can only use the reasons that are contained in the Board order. I was not present at that hearing.

Mr. McLean: Okay. We have a copy of the Board order?

Mrs. Scrivener: Yes.

Mr. McLean: Fine, thank you.

Mrs. Scrivener: Section 15(4) in the Ombudsman Act says:

"Nothing in this Act empowers the Ombudsman to investigate any decision, recommendation, act or omission,

"(a) in respect of which there is, under any Act, a right of appeal or objection, or a right to apply for a hearing or review, on the merits of the case to any court..."

And so on and so on and so on. I think that your familiar with that section.

The Ombudsman's material to you includes the fact that the Counsel for this applicant, who acted on her behalf before our Board, who was in subsequent communication with the Ombudsman's Office in response to their telephone calls,

was aware of the Dalton case at the time she came before our Board. She was aware of that case.

I put it to you if she felt that the case, the Dalton case was applicable, she would have sought an appeal before the Divisional Court. She is a very busy, aggressive Counsel, whose specialty is Family Law and Family Violence.

Madam Chairman: Mr. Philip?

Mrs. Scrivener: She certainly had the opportunity --

Mr. Philip: Well, with respect, here you have a woman who is living in Calgary.

Mrs. Scrivener: She was not at that time. Oh, I beg your pardon. She had moved, I am sorry.

Mr. Philip: She had moved to Calgary or otherwise you would not have paid her transportation from Calgary.

Mrs. Scrivener: Yes.

Mr. Philip: The lawyer is faced with the -- the Counsel of whether or not to take it to the Ombudsman or to take it to court, which would involve extensive transportation costs, probably at her expense, at Legal Aid expense and considerable discomfort to someone who has a neck problem and, therefore, probably would not want to undergo the discomfort of driving back and forth on a bus from Calgary to Toronto on more than one occasion.

I suggest to you it might be perfectly reasonable to take it to the Ombudsman as an alternative to taking it to the court and the fact that they did not take it to court, someone may not go to court for a variety of reasons. Their Counsel may not accept Legal Aid Certificates. This woman was on welfare.

Counsel may feel that an alternative route; namely, the Ombudsman's, might be a preferable solution. There might be a variety of reasons why one would not go to court. It happens every day.

Mrs. Scrivener: You have made a very nice case for her and I would wish you would represent me some time.

In point of fact, the appearance before the Divisional Court would be made by her Counsel only. She would not be required to be present.

Mr. Bell: You are inviting the Committee to draw an inference from the fact that there was not an appeal to the Divisional Court and I think the Committee understands your submission in that regard.

Mrs. Scrivener: All right. And then we come to this whole matter of the -- In conclusion, I think this whole matter turns on the doctrine of *functus officio*, which is the fact that the Board is simply dead-ended in terms of its legal authority to reverse a decision.

I have received -- that is not it. Where did I put that paper that you gave me?

At noon hour today, we went into our office and looked in the file for a communication, which I received on May 9th, 1986, from Mr. Julian Polika, who was then Director of the Crown Law Office, Civil, and I had asked him or had been discussing with him some matters relating to items which were before the Board and one of these, of course, was the variation of an order in the face of a denial.

We had had a request for a reversal of a decision denying an application and this is in response to that. Mr. Polika says:

"Points in issue: (1) In the circumstances, does the Board have any jurisdiction to vary the order refusing to award compensation?

"(2) What effect, if any, is there on the hearing of the one Board Members' prior involvement with the file?"

I had a concern that a Board Member might have prejudiced things in some way because he had responded to, I think, a telephone call.

"Opinion: (1) It is our opinion that the Board does not have jurisdiction to vary an order where compensation was refused.

"(2) It is our opinion --"

Oh. Well, the second question really is not possible.

"Reasons: Section 25(1) of the Compensation for Victims of Crime Act provides as follows: 'The Board may at any time on its own initiative or on the application of the victim...'"

And so on and so on, "...vary an order for payment of compensation..." et cetera, "...as the Board thinks fit..." and so forth.

"It is to be noted that the clear words of the statute indicate the jurisdiction given to the Board is: '...to vary an order for payment of compensation'; in other words, it is a condition precedent to the Board, having

jurisdiction to deal with an application to vary that there be an order of payment of compensation.

"In this matter, it is clear that when one has regard to section 17 and the original Board order, that the original Board Order made no order for payment of compensation. Accordingly, the condition precedent was not satisfied and the Board does not have any jurisdiction to vary the Order in question.

"There has been some referral made to the case of Dalton v. Criminal Injuries Compensation Board. The case has no application in the circumstances here..."

Oh, I am sorry. That is another one entirely.

"The directions to the registrar and the opinion of this office to the Board over the years have been to the effect that no Board Member conducting a hearing should have any involvement..."

Oh, well, that deals with the second item, so anyway, that is in bits and pieces, but that is from a letter from Mr. Polika, concerning another case, another issue, but he says it in very succinct terms.

In point of fact, Madam Chairman, when we require an opinion on a delicate point of law, I refer to the head of the Crown Law Office, Civil, for opinions and these are forthcoming and they are usually quite carefully prepared and researched.

If the Members of this Committee would wish to have a legal opinion from a member of that office, it can be provided today. It would be an oral opinion, but you can get it from someone who is learned in the law, which I am not, if that would be of interest to the Committee.

Mr. Philip: Several of their opinions have been thrown out in the Supreme Court, so I hardly consider them a prime authority.

Mr. Lupusella: Not necessarily.

Madam Chairman: Thank you, Mr. Philip. Mr. Lupusella?

Mr. Lupusella: I said, "Not necessarily through yet." There are some coming down.

Mr. McLean: I think, Madam Chairman, from the indications I got, it was that their position is not changing.

I think the Chairman has just stated that, so I do not think there is a lot of time -- we are wasting a lot of time

going through a lot of the procedures that we are talking about.

She has indicated that they are not changing their position, so why don't we just open it up for questions, if any, and carry on?

I think I have listened to enough procedures and meetings and committees, which are not really dealing with, as far as I am concerned, the nuts and bolts of it, so let's -- their position is not changing and we know what the Ombudsman's position is, so if there are any questions to the Chairman, why don't we have them and then make our decision?

Madam Chairman: Yes, Mr. Lupusella?

Mr. Lupusella: With great respect, we had an opportunity to hear at long length a presentation made by the Ombudsman and, too, it would be unfair to raise this issue now at this point in time for the other party to stop the presentation and for us to raise questions.

I think we should give the Chairman of the Board an opportunity to complete her presentation.

Mr. Philip: I think it is Mrs. Scrivener that has to decide when she has completed her presentation. It is not for us, otherwise we could be accused of a bias.

Madam Chairman: Do I understand that a solicitor from the Crown Law Office is here with us today?

Mrs. Scrivener: Yes.

Madam Chairman: I assume it is -- sorry, I do not know your name.

Mrs. Scrivener: Mr. Peter Lockett, the Deputy Director of the Crown Law Office, Civil, is here and can give you an opinion, if you would like to receive it.

Madam Chairman: What I would propose is that if you can complete your presentation and then I think when the questioning does come, I am sure that a question of jurisdiction will come up and section 25. And, at that time, we would appreciate it, if you are still available, to answer questions in specific because part of the case does revolve around section 25, which is the significance of the fact that there was no compensation ordered and whether, in fact, is an order for compensation, although it be none.

So we would certainly like you to have the opportunity to finish your presentation, rather than go into that point and if we do have questions in that area, we would

appreciate having legal opinions from both sides.

Mrs. Scrivener: Fine. To go back to the Act, the Act is quite clear. It makes a provision for costs. It makes a provision for compensation. It makes a provision for interim payments when -- there are times when persons who have suffered bereavement or extreme injury are in financial need. The Act is quite the humane in that regard.

The Board may, in its discretion, order interim payments to the applicant in respect of maintenance, medical expenses and funeral expenses. Our Act provides for funeral expenses and some do not and if compensation is not awarded, the amount so paid is not recoverable from the applicant. I think that that is quite an important notion, that we do this because we are trying to help people.

Similarly, I think it would be very shabby business practice to have an applicant before you, to expect the applicant and the solicitor, if there is one, to be providing you with medical reports and all sorts of information, which cost real money, and on these things, you base your opinion and then, if you deny an award, say: Too bad, you are out of pocket.

We pay and it is perfectly reasonable to pay those costs and that is provided for in the Act. To do anything else, would be very, very unfortunate behaviour and not worthy of the people of Ontario.

Mr. Lupusella: I have a supplementary one to this particular point.

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: We know that Ms. D, the Board allowed certain payments for her travelling expenses. Was this process done on a basis of humanitarian ground or any particular section of the Act, which empowered the Board to do so?

Mrs. Scrivener: This was done because at the end of the hearing, as a rule, the Board -- whoever is the Panel Chairman will say to the solicitor: And as to costs...

The solicitors always have a good list. They say: Well, there was the travel, there were the hospital records, there were the medical records.

If they have not already done so, they will submit their receipts and this is all received and that is how we note in very precise terms, that medical records to the extent of \$150 and \$172.25 were paid.

Mr. Lupusella: Was this part of a routine process?

Mrs. Scrivener: Absolutely routine.

Mr. Lupusella: Okay.

Mrs. Scrivener: We received these on every Board order.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Mrs. Scrivener, this Act was drafted in 1980, and an amendment --

Mrs. Scrivener: Revised. There was a minor revision in 1980. It actually goes back to 1971.

Mr. Johnson: All right.

Mrs. Scrivener: It was Arthur Wishart's.

Mr. Johnson: Well, the one we had was 1980.

Mrs. Scrivener: Yes.

Mr. Johnson: You presented us with the 1987 copy.

Mrs. Scrivener: Yes. This is --

Mr. Johnson: There are some changes, one I notice in section 19, pertaining to the amount of reward.

Mrs. Scrivener: Yes.

Mr. Johnson: Was there anything else changed that would have any bearing, at all, in this case; for example, there was no mention made of 17(1).

Mrs. Scrivener: No. 17(1) stayed...

Mr. Johnson: I think it is exactly the same; is it not?

Mrs. Scrivener: Yes. It stays the same and 17(2) stayed the same. 17(3) was broadened and we were very grateful for that. 17(3) was broadened to say:

"...shall take into consideration any benefit, compensation or indemnity paid or payable to the applicant from any source other than general welfare assistance or family benefits."

Up to that point, applicants who received awards were caught if they were on family benefits. It was the "Catch-22", but it was very inequitable for anybody who was receiving payments from other sources and did who not have their own income. It was very bad --

Mr. Johnson: I think, Mrs. Scrivener, the point I wanted to make is that the Ombudsman suggests that 17(1) is not clear, that there should be more definition for the Board Members' interpretation of it.

When that was changed in '87, and changes were made even in section 17, if the Legislature felt that changes were needed for clarification, would that not have been an appropriate time to have made them?

Mrs. Scrivener: Yes. It would have been because this Act was worked over twice and very carefully for the 1986 changes, but in 1980, the Act was changed and that was when "may" went to "shall"; isn't that it? Isn't that the date, in 1980?

The earlier Act had made the -- the earliest version of the Act said, in 17(1):

"The Board may have regard..." Then, when the Act was revised, that "may" became a "shall", which is very much stronger. It means you must.

Mr. Johnson: Yes. The point I was trying to make was that if the Ombudsman feels that it is not clearly defined and that they feel that one of their recommendations is that guidelines are necessary to assist the Members in applying sub-section 17(1) of the Act, I wonder why a presentation was not made at the Committee that was involved in changing the Legislation.

Was there any presentation made, at all, concerning section 17(1) or can you remember?

Mrs. Scrivener: No. This went through the House and that section was not debated in the 1986 debate on this Act.

Mr. Johnson: They dealt with 17(3), but not (1)?

Mrs. Scrivener: 17(3) was of great concern to many Members in the Legislature because it was so discriminatory in the old form.

Mr. Johnson: Yes. Thank you, Madam Chairman.

Madam Chairman: Thank you.

Mr. Bell?

Mr. Bell: Mrs. Scrivener, can we talk about the Dalton decision for a moment?

Just to refresh everyone's memory, chronologically, the Dalton decision appears to have been pronounced in April of 1982, and this particular application and Board decision is

November 1982.

Can you assist the Committee, was there any advice received by Members of the Board from any source, as to the effect of the Dalton decision on the Board's deliberations?

Mrs. Scrivener: Oh, I think so.

Mr. Bell: Yes. Well --

Mrs. Scrivener: I was not there, of course.

Mr. Bell: Okay, all right. Well, then, it is not fair to ask you to speculate.

Mrs. Scrivener: I am reviewing who sat. One was a very distinguished litigator, who took great pride in keeping abreast of everything that was going on in law, especially as it affected our Board.

Mr. Bell: Okay.

Mrs. Scrivener: And the Board, I have seen in early correspondence, I think, was well aware of Dalton.

Mr. Bell: Okay. Can we agree that back in '82, and, in fact, today, that what Dalton means is that if the injuries are severe and if all of the other essential ingredients necessary for compensation are present; i.e., an act or omission, an injury resulting -- caused by crime, et cetera, if the injuries are severe, the Board cannot dis-entitle the person to some compensation?

Mrs. Scrivener: Sorry, sir. That is not the way it is viewed.

Mr. Bell: Well, how do you view Dalton, then?

Mrs. Scrivener: It is a factor to take into consideration with all relevant circumstances. It is one factor.

The seriousness of the injuries is a factor, but there were other factors in both of these cases and in this one, particularly, although there was a considerable amount of alcohol consumed, this lady admitted, apparently, to the Board that she was intoxicated as a result of her consorting with her husband that night, but she later stated that she was sober when she drove to the store.

If she was sober, she was in command of her senses and she made decisions, conscious decisions.

Mr. Bell: Well --

Mrs. Scrivener: And she knew her husband and his propensity for violence.

Mr. Bell: All right. You may want the assistance of legal counsel, but I must tell you, I read Dalton as saying, yes, they are all relevant considerations and they are all relevant considerations in determining whether and to what extent you reduce an award, but they are not relevant considerations to dis-entitle the person if the injuries are severe.

Now, I appreciate that may be your view of it. I guess the question is: What is the view of those who have been advising the Board in law as to the effect of the Dalton decision on the Board's deliberations?

If you want Counsel to assist you, by all means.

Mrs. Scrivener: I will ask him if he has an opinion, thank you.

Mr. Bell: I am sure he does.

Mrs. Scrivener: Ladies and gentlemen, this is Mr. Lockett and he is with the Crown Law Office, Civil. He is the Deputy Director.

Madam Chairman: Thank you.

Mr. Lockett: Thank you, Madam Chairman.

I am not sure that I am in any great disagreement with Mr. Bell on the Dalton case. I think what it stands for is the proposition that the Board must review relevant circumstances and one such circumstance is the severity of the injury.

Having said that, I think it also, obviously, in the discretion of the panel, hearing the case and hearing the evidence, to decide what priority and what significance to give to those various factors and to make an ultimate determination, having weighed all of those considerations. So I read it as a direction to consider all the relevant matters, but clearly not a direction to say that in all cases must compensation be paid.

Mr. Bell: All right. That is fair. Let's check off some other things.

If you have a 17(2) situation; for example, refusing or failing to cooperate with the authorities, that is another ground to deny compensation, so you could have a combination.

You could have a severe injury, but you could have

somebody who has refused reasonably to cooperate or failed to do so and in that case, the Board would probably be correct in dis-entitling, but we have not got that here, okay?

Given the facts that we have and given the Dalton facts, all right, I want to know what your opinion is, that if injuries are severe, you cannot shut somebody out.

You may only consider the other factors; alcoholism, "volenti", to coin a legal phrase. Any considerations that Mrs. Scrivener has cited, I assume under the Negligence Act, may only be used to determine the extent to which you reduce the award.

Mr. Lockett: Well, I think, Mr. Bell, and to some extent perhaps Dalton's trite law, to the extent that it says the Board must consider all relevant matters.

I think there is no argument about that and, clearly, it is said and I think probably properly that the severity of the injury is one such relevant matter. But it still must lie ultimately in the discretion of the panel who has the chance to hear and weigh the evidence to assess how severe those injuries are in the context of all of the evidence and ultimately make its determination.

I note, as was adverted to earlier, that the Counsel in this case chose not to make any appeal on the basis of the Dalton case and, obviously, they had the much more intimate knowledge of the case at the time than we do, speculating six years after the event.

Mr. Bell: Well, all right. Then let's go at it this way: Assuming severity of injuries, what considerations do you say are available or what factors do you say are available to the Board to consider, to eliminate, or to deny compensation?

Mr. Lockett: Well, I am not clearly a Member of the Board and I do not think it would be appropriate for me, Mr. Bell, to attempt to list what are germane factors for the Board to consider.

Obviously, it depends on the circumstances of the case and the evidence that has been led before it. You know, I certainly agree that they must consider all relevant circumstances, but I am making the supposition that the complaint is not, in this case, that they failed to do that, given the absence of appeal and Counsel acting for the applicant in it.

Mr. Bell: Has the Ministry formally advised the Board on the Dalton decision?

Mr. Lockett: I am not the Counsel who normally acts as the adviser to this Board. It has been in the past Mr. Polika and now Mr. Marshall, who is out of the office on an inquest today, so I cannot speak from my own knowledge.

I know certainly there have been discussions from time to time. I would certainly expect that the Dalton has figured in those discussions, but I cannot of my own knowledge answer that question for you, sir.

Mr. Bell: Mrs. Scrivener, you mentioned Mr. Justice Krever in 1985, was made available to the Board Members to advise them on decision-writing, I presume.

Do you know, did he discuss with any Board Members the Dalton decision?

Mrs. Scrivener: Only that it has been raised, you know, as a point of law because we examined all of the appeals from time to time, as they relate to items that are before us; for instance, a very recent appeal, which was denied by the Divisional Court had to do with a point that you just raised.

You raised the point of 17(2), noncooperation in face of a serious injury. They have just denied an appeal on that very ground.

Mr. Bell: Okay. But did Mr. Justice Krever give the Board or any Members any advice respecting the Dalton decision?

Mrs. Scrivener: Oh, that was not discussed, no. We were talking about matters which were rather more basic to the Board in terms of its preparation of Board orders.

Mr. Bell: Does the Board now specifically consider severity of injuries in its decisions?

Mrs. Scrivener: Yes. I think it --

Mr. Bell: Does that happen in all cases?

Mrs. Scrivener: Yes. It is a weighting factor. It is not the only factor. A Board must take into consideration all relevant factors and the responsibility of the individual is one of those factors.

Mr. Bell: Well, as I listened to you earlier, you seemed to be saying that the responsibility of the individual is a factor that can override the severity of the injury.

Mrs. Scrivener: Every case is different. You cannot make a blanket statement because I could make a statement

about one instance now and you can give me a different case entirely and the Board Members would approach that differently.

If you did not do that, it would be a very sorry state of affairs, I think.

Mr. Bell: Okay. Can I ask you about section 22, orders? That is the costs section.

Has the Board ever -- excuse me -- to your knowledge varied an order made under this section?

Mrs. Scrivener: No, only inasmuch as we have had solicitors come to us and say: I gave you so-and-so costs and I forgot that we had something or other.

Well, we have to make another order, but we would certainly pay the extra cost because it is a legitimate cost that he has incurred and it was his oversight, perhaps, that he did not submit it.

Mr. Bell: He had brought new evidence to you re costs?

Mrs. Scrivener: Well, he brought us a receipt for something he paid for.

Mr. Bell: All right. And the second order has the effect of increasing the payment made?

Mrs. Scrivener: Yes. It might be something quite trivial. Most costs are not very great.

Mr. Bell: What authority under the Act do you make that second order?

Mrs. Scrivener: I would think under 22.

Mr. Bell: Can you help us as to how 22 gives you that authority?

Mrs. Scrivener: I cannot hear you.

Mr. Giuffre: 25, new evidence.

Mr. Bell: 25? I am sorry. Did somebody say, and if you did, would you introduce yourself, that a second order made, increasing costs is an order made under section 25?

Mrs. Scrivener: Yes.

Mr. Giuffre: Increasing costs, you are saying.

Mr. Bell: That is what we are talking about.

Mr. Bell: Yes. The one item the Committee is most interested in is the broken bone in the neck, which generally kills people.

What is the Board's view of the seriousness of that injury?

Mrs. Scrivener: Our files contain, and I guess the Ombudsman has the reports as to when she was received in hospital, the statements of the admitting doctors and the summary of her injuries.

A doctor who did an assessment of her, apparently, in -- it looks as if it is 1977, which was then... Yes. This was some several weeks after her injury and an assessment was done at that time.

Mr. Bell: Mrs. Scrivener, we have all that information.

Mrs. Scrivener: Yes?

Mr. Bell: We are just interested to know what is the Board's view of the seriousness of those injuries? Does the Board consider them to be serious or not?

Mrs. Scrivener: I would assume that the Board did consider them serious, that they referred to her injuries in the Board order and there was a very considerable description of her condition when she was first injured and the fact that she was taken by an ambulance. And it mentions a couple of times that she was having difficulty breathing and I gather that there was some difficulty in making a diagnosis at the hospital, from what I have read, so the initial diagnosis was not made immediately.

Mr. Bell: Well, we know what the diagnosis is and we understand now the Board considers those injuries to be serious in nature?

Mrs. Scrivener: Yes.

Mr. Bell: Okay.

Mrs. Scrivener: We consider all applicants who come before us as having serious injuries, as a rule. Very rarely do we have someone who has something inconsequential.

Mr. Bossy: But some more than others.

Mr. Bell: I have just one more area of question, Madam Chairman.

You provided the Committee with some of the Board material this morning. Can I just ask you to refer to the

"We Care For Victims Of Crime" brochure, at page 4?

Mrs. Scrivener: Yes.

Mr. Bell: First of all, this pamphlet is prepared by Board staff?

Mrs. Scrivener: No.

Mr. Bell: No. It is prepared by the Government?

Mrs. Scrivener: Well, it is done by somebody who was retained to do this.

Mr. Bell: It is fair to say, though, that it represents the position of the Board?

Mrs. Scrivener: Yes.

Mr. Bell: And the Board obviously concurs with all of the content?

Mrs. Scrivener: Um-hmm (affirmative).

Mr. Bell: Would you look at page 4, "What is Included in Compensation?"

Mrs. Scrivener: "Reasonable expenses, such as medical bills, prescriptions, and funeral expenses."

Mr. Bell: That is not intended to be an exhaustive list, but that is an example, three examples of reasonable expenses?

Mrs. Scrivener: Yes.

Mr. Bell: Now, with reference to the order made in this case and also the order made in the other case, where there were payments made for hospitals records and medical reports, does it not seem that the payment that you have made for costs is a payment of something called "medical bills"?

Mrs. Scrivener: I understood that one of those payments were for travel.

Mr. Bell: Well, you are correct. Part of the payment in this case, is for bus expense, travelling expenses to and from, but the other two payments, there is a payment of 20-some-odd dollars for hospital expenses, hospital records and the remaining payment, over \$100, is for medical reports.

Does it not seem that that part of the order, at least, has been a payment for medical bills?

Mrs. Scrivener: No, because she would have been covered by OHIP.

Mr. Bell: I am sorry, I do not understand. Compensation can include medical bills?

Mrs. Scrivener: Oh, yes, anything that is extra and over and above OHIP, but OHIP does most of it.

Mr. Bell: Okay. Can you turn to the document, "A Guide To Applicants"? Do you have that? Can you just turn to the very last page, under Item 13?

First of all, is this a Board document or under the same category as the previous booklet?

Mrs. Scrivener: Yes. We do not do any of this printing and publication, but it is used by our Board in conjunction with the application form.

Mr. Bell: But the Board is aware of and has endorsed the content of this document; is that correct?

Mrs. Scrivener: Um-hmm (affirmative).

Mr. Bell: Under the heading, "Can I Appeal A Decision Of The Board," second sentence:

"However, the Board can review a decision if new and significant evidence becomes available."

Is there a reason that this brochure in this particular section does not indicate that only some decisions can be reviewed?

Mrs. Scrivener: I do not know, but I would suggest that it has probably been written to simplify things to a very considerable degree and that is why it is not specific.

It should not be written in such a general way because I think that makes it misleading.

Mr. Bell: Would you agree, though, that a fair reading of that sentence is that any decision of the Board can be reviewed if new and significant evidence becomes available?

Mrs. Scrivener: You might put that interpretation on it.

Mr. Bell: I just said it is a fair reading of it.

Mrs. Scrivener: But I think it is misleading and if our thousands of copies finally get used up, I will certainly have the copy changed because I think it is misleading.

Mr. Bell: Your Counsel should help you on this. You will recall the discussion we had this morning with Mr. Zacks, as to the presence or whether there is any inherent jurisdiction in this tribunal or any other tribunal to correct previous decisions made, which are nullities.

Does your Counsel have any comments in that regard that may assist the Committee as to whether on the law, as he knows and understands it, this tribunal has such an inherent jurisdiction?

Mr. Lockett: As you will appreciate, Mr. Bell, I was not present for the discussion this morning, so I am not really aware of what Mr. Zacks may have suggested to you.

To the extent I understood the policy in this case was referred to, it has always been my understanding that that line of case refers to a situation where no proper hearing took place in the first instance because there was some denial of natural justice or there was some significant procedural flaw, such that it tainted the whole proceeding and that, in those situations, it has been held the Board may reconsider the matter.

In Posluns, going on recollection and I may be wrong, but as I understand it, the complaints were made against the stock brokerage firm and there was no indication that sanctions would be applied to the individual member and, in fact, that is it what took place, so it was judged that that proceeding was unfair, that he had no notice that his own career was in jeopardy and on that basis, a fresh hearing was given to him.

I think those such cases are quite, quite different from what I apprehend happened in the cases that the Committee is reviewing, where, in fact, a full hearing did take place and there is, as I understand it, no suggestion that there was a nullity or a denial of natural justice took place.

Mr. Bell: Can we flip to the hypothetical then and assume a Posluns-type fact situation vis-a-vis this Board, where there has been such an obvious denial of natural justice -- and purely in the hypothetical, Mrs. Scrivener, I assure you -- given those circumstances, does this Board have the inherent jurisdiction of the Supreme Court of Canada articulated in that case to correct its own mistake?

Mr. Lockett: I do not know, frankly, Mr. Bell, because the one distinction is that the Board here has, under section 25, a direction from the Legislature as to under what circumstances it may embark on a rehearing.

Now, I honestly have not had a chance to look at what the governing legislation of the Toronto Stock Exchange was

and I do not know to what extent those two cases are "on all fours".

There may be situations where they may have a type of jurisdiction. I, frankly, have not put my mind to that, but I certainly know that here you have got a direction from the Legislature that delineates the circumstances where a hearing has taken place, a full hearing, under what circumstances a rehearing may be embarked upon.

I think that serves to really set the parameters for the Board's jurisdiction in the situation we have here because we are really not dealing with the hypothetical situation that you are putting forward, as I understand it.

We are dealing with a situation where a full hearing took place, a decision was rendered and no appeal was taken.

Mr. Bell: No. I am interested in the inherent jurisdiction principle and I think, in fairness to you, we have to accept the "I do not know" answer, either because you have not had an opportunity or because there -- it is a debatable point, I guess.

Mr. Lockett: I suppose it is debatable and, frankly, I did not perceive it to be an issue in these proceedings and I really have not given it consideration.

Mr. Bell: I do not have any further questions, Madam Chairman.

Madam Chairman: Mr. Charlton?

Mr. Charlton: Yes. I have several questions for your Counsel, based on the opinions that have been given here.

My understanding is that the appeal to the Divisional Court is restricted to an appeal on a matter of law as a result of the original hearing, so that in appeals to the Divisional Court, the Divisional Court would not hear an appeal based on new evidence; am I correct?

Mr. Lockett: I think basically that is correct, unless there was a flaw in the proceedings before the Board, where they had improperly failed to admit evidence.

Mr. Charlton: I am talking about new evidence, evidence that was not presented at the original hearing.

Mr. Lockett: Yes, I agree with you.

Mr. Charlton: And based on the opinion which you gave us, that in the case of an application which is denied, where there is no order for compensation, that the Board does not have the power to reconsider, based on new

evidence.

What you are telling us is that the Criminal Injuries Compensation Board, under its legislation, has -- there is no authority for appeal of a case on a denial, based on new evidence. There is no appeal process, at all?

Mr. Lockett: Yes. The extent of its powers are delineated under its constituent statute. It generally, apart from the discussion I was embarking on with Mr. Bell, really has no inherent powers.

Its powers are set out within the statute and to the extent that the Legislature constructed section 25 in that fashion, it really is the straight jacket or a limit upon what the Board may do.

Mr. Charlton: Okay, thank you. My next question refers back to the Dalton case and I cannot quote exactly, but my recollection of the presentation this morning, in the judge's remarks... Just if you give me a second here, I can probably find it.

It was part of the Ombudsman's presentation where the judge suggested in his remarks that the severity of the injuries were, in fact, greater than the risk, which the woman in the Dalton case could reasonably have expected in the circumstances, based on the risk which she undertook by entering the van with unknown gentlemen.

I would take from that, and I would like your opinion on this, that, in fact, one of the things that the judge was saying in the Dalton case, was that that is the way in which you consider the severity of an injury. If the severity of the injury is far greater than what the victim might reasonably have expected to incur, based on the risk which the victim undertook, that the Board, then, cannot deny in total, but consider reducing.

Mr. Lockett: I think I basically agree with the construction you are putting on the Dalton case. Certainly, the Court says that that is a relevant consideration and that to weigh the extent of the injuries that might have been anticipated as against the real injuries and against the type of conduct they run into is a relevant matter for the Board to weigh. But in light of the Dalton case, in that decision, I think it is interesting that an appeal, therefore, to the Divisional Court would be open on the same grounds, if that was the belief of Counsel for the applicant, that that type of--

Mr. Charlton: I understand that, I understand that.

Mr. Lockett: --judgment had occurred.

Mr. Charlton: The question which flows from that, which is, perhaps, for you or for Mrs. Scrivener, then, is that albeit that the victim, Ms. D in this case, had considerable knowledge of her husband's propensity for violence, since she had obviously been through that on a number of occasions, as we understand it, been beaten on a number of occasions, that, in fact, we have a similar circumstance here to the Dalton case, in which she had reasonable and perhaps good knowledge of what risk she was running by, in her words, getting into that car and trying to protect her children; that she may, in fact, suffer some kind of physical abuse. But the severity in this case is extremely different than what she would reasonably expect, based on the past.

Mr. Lockett: Perhaps Mrs. Scrivener can address you more directly on the issue you are putting.

The only observation that I would like to extend is that certainly, to the extent that it is a legal question, appellate courts - which are somewhat in the nature of this body, who are sitting on the basis of a written record that happened after the event and do not have the benefit of listening to all of the proceedings and watching the witnesses - there are always many directions from an appellate court that they are really not in as good a position to make the initial judgment as the body hearing it in the first instance.

I think that is a caution that applies probably here, in that it is easy to second-guess, but it is a little dangerous when you do not have the benefit --

Mr. Bell: You sound like, doing that, we should not be here, at all.

Mr. Lockett: Well, because what is in question here, sir, is really the judgment or the discretion that was being weighed by the Board Members and it is really, these are all factors they have undertaken into their consideration.

What is really embarked -- I respectfully suggest is under way, is a reconsideration or a second-guessing of the weight they put on these various factors and I am just suggesting that is a difficult thing to do, sitting here and not having the benefit of the evidence that was before them.

There may be other situations where it is clear that something, some travesty transpired and there is really a proper role to be undertaken.

Mrs. Scrivener: Madam Chairman, --

Madam Chairman: Mr. Charlton, do you have any further questions?

Mr. Charlton: No. I would like an answer to my question, though.

Madam Chairman: Sorry, Mrs. Scrivener?

Mrs. Scrivener: Mr. Charlton, you know the time warp is a factor. The date of the offense was July 2nd, 1977. The date of the application, the inquiry was first received on December 4th, '78.

The application was received February the 19th, '79, and it was ultimately set for November 16, '82, and I think the decision handed down was several weeks thereafter. And so you have this great time lag between 1982, the winter of 1982, through to 1986, and the application to the Ombudsman. So it is a factor.

Mr. Charlton: Well, I understand that, but you have told us you --

Mrs. Scrivener: But I am coming now to your point about Mrs. Dalton.

Here was a person, whose decision-making capacities were certainly impaired and who went through a once-only, a once-only experience, a dreadful experience, but certainly once only.

In the case of the applicant before you now, she was in the process of actively divorcing her husband. She left him.

Mr. Charlton: I understand that.

Mrs. Scrivener: She had been engaged in a number of incidents of violence, some of which-- in which she was hospitalized and on many, many occasions, the police were called.

She knew his propensity to violence. She knew his pattern of behaviour when there was drinking, but nevertheless, she suffered his company at a party and suffered his company when they went home. There were just the four of them, the husband and wife with whom she was staying, plus herself and her husband and the sleeping children.

She suffered his company all night long and then when more argument and violence erupted at the store, she volunteered not only to take her children back, but also drove her husband.

She did not leave her husband. At any point in time, she could have walked away from the situation and she did

not and then, to have him in an alcoholic state of violence, in the car with her, with her children and another person, I think was really, real brinksmanship (phon.) in that situation and I think that she had to know--

Madam Chairman: A point of order, Ms. Morrison?

Mrs. Scrivener: --she had to know what could possibly happen.

Mr. Charlton: Well--

Madam Chairman: Now, just a minute, sir, Mr. Charlton. I think Ms. Morrison had a statement she wanted to make.

Ms. Morrison: Oh. I just wondered if there were some facts in there that were kind of brought in that we had not heard before, but I do not think they were important.

Madam Chairman: Mr. Charlton?

Mr. Charlton: That is essentially what you said before. I still do not think you have answered my question.

My question is, I mean, you have said a number of times that she had suffered violence at the hands of this man before.

The Ombudsman, in his report, has admitted that perhaps she took a risk by being involved in the situation with her husband, both during the course of that night and on the morning in question. She stated reasons why she took that risk. The Ombudsman presented that to us this morning.

My question to you is: The Dalton case seems to reflect the judge's decision that the injuries were far more severe than what the risk the victim understood that they are taking normally would have warranted. And it would seem to me that in this case, you have got a woman who, having been through violence with this gentleman on a number of occasions, was fairly familiar with the extent of injury that she had suffered in the past and weighed a risk against a probability of injury and ended up with an injury far more severe than what was normal in the circumstances.

Based on the Dalton case, I am asking you: Did the Board consider this case in that way, the way that is suggested by the Dalton case, that it should be considered?

Mrs. Scrivener: Madam Chairman, I am sorry. There is no way I could express an opinion in answer to such a question.

I have not discussed this with the sitting Board Members, neither of whom are Members of our Board now, and I

was not present at the hearing and so it would be pure conjecture on my part to try to respond.

Madam Chairman: Thank you.

Mr. Bossy?

Mr. Bossy: Yes. We have made an awful lot to-do about the compensation end of it, but I would like to come back to the reasons that the Board used mainly.

I look at 17(1) as really being the one that really weighed very heavily on the decision that the Board made. If that is so, that the decision was made mainly on the basis of what the lady might have provoked or gotten involved in, the night before, so there was a party; that is fine.

There was no criminal act performed or happened during the evening and the party. Sure, they were together; a small community, living very close. She did not -- we do not know whether she invited him or whatever may have happened, but in the morning when the party was over, she decided to go to the store to get some supplies, taking a friend with her car, with her car.

So, she took off and went to the store. The husband, in a drunken manner, as we understand, gets into his car, takes the kids along with him, ends up, in other words, following his wife. As any evidence that I have seen, he followed his wife to the store, including running into the ditch, stalling his car and there they were; no means of coming back.

Now, was she provoking or was she encouraging him to come after her, to perform the act that he did? It was only because she had three kids involved, she invited him and there is, even as bad as a person may be, you sometimes -- and in this case, it was the husband -- that did not touch her that night, that I can understand. They might have argued, but the fact is, here, that he got in the back of the car with the kids, the friend in the front seat and she is driving back home.

But she really did not encourage him to come after her when she went for supplies, but the criminal offense took place and that is what we are deciding on, then, the criminal offense that took place, the time it took place, the severity of it, but the whole thing is being decided on the basis of what happened, of the drinking party, her association again.

Her husband happened to be back at the party or we do not know for sure how he arrived there, but also, there was evidence that they both were at the party with their

individual vehicles.

She had her car, she had her car and he had his car, so that she had not gone and got her husband and taken him to the party, so I have a little bit -- like, the main decision by the Board, I have to assume was made on the basis of 17(1) and that you conclude that she really contributed totally to what ended up happening.

Mrs. Scrivener: The whole matter turns on those words, "all relative circumstances," and identifying the content of the Board Order, you have the whole matter of her consorting with her husband in a social way in the evening and through the night, but this was done in the face of having issued a peace bond some two weeks before; one of several peace bonds, which had preceded it and this latter peace bond was for a year.

She was actively seeking a divorce from her husband because of his violence. She issued the peace bond because she was concerned for her personal safety, but she still knowingly associated with him in all of the circumstances which had precipitated the violence in the past.

She made voluntary decisions, which she did not have to make. She could have left or walked away from it at any time and at the store, she could have left him. It was a small community. He could have got a ride. She could have left the him, even at that point, and she did not.

Mr. Bossy: Did the Board have evidence of any of the violence, the previous violence that had occurred was of a criminal nature or intent of a criminal nature?

Mrs. Scrivener: All family violence is regarded in that way. It is an assault, assault causing bodily harm is the biggest item, the biggest single item for which we pay compensation in the Board.

Madam Chairman: Any further questions, Mr. Bossy?

Mr. Bossy: No.

Madam Chairman: Mr. Philip?

Mr. Philip: Well, one of the issues I think we have to look at was whether her behaviour was prudent or imprudent under the circumstances.

First of all, the peace bond does not prevent her or him from seeing one another. That is fairly clear, if you look at the peace bond.

Maybe the person who issued the peace bond should have given a different kind of peace bond with directions that

they not see face-to-face.

Secondly, the night before, she had some protection because she was with another couple; therefore, she and her children were not under as great a danger as she would have been alone.

Suddenly, we find her in a situation in which, as Mr. Bossy correctly points out, he follows her to the store, but worse than that, he is drunk and he takes the kids with him, so she has got the concern about the children, the safety of the children.

Now, I ask you, faced with that kind of situation, the situation of where she can get into the car, take the children and albeit him home in his drunken state, would a rational person under those circumstances feel that they would be in more danger doing that than they would be, leaving him on the side of the road, where he will arrive home in an even more irritated state and, chances are, beat up on her and the children because he is twice as angry now because he has been left on the side of the road to walk home?

Mrs. Scrivener: It was not his home. He was a visitor there. She did not have to assume that he would return. Had she scooped up her children and left, she could have refused his entry technically, I suppose, if you really want to take this argument.

Mr. Philip: But whether it is his home or not, he was the one that had the children. They were his children as much as her children.

Mrs. Scrivener: It was her residence at that time because she had left him.

Mr. Philip: But there was no order saying that he could not enter that residence?

Mrs. Scrivener: Oh, I guess so, because it was not his home.

Mr. Philip: It was not the terms of the peace bond.

Mrs. Scrivener: What gives him the right to have access into another person's home without permission?

Mr. Philip: His children are in the other person's home. I mean, the real facts are -- somehow there is a painted -- I guess I get a little annoyed when I hear these stories that somehow these women are supposed to suddenly pick up and leave and get away from the person that is beating them. But the real facts are that a majority of the beaten women that are in the circumstances, at least that I

run into on an almost daily basis because I have them coming into my riding office, they are not in the socio-economic or educational bracket where they have very many choices. Their choices are either going into a group home or going on welfare or being out on the street.

This woman was taking action to try and divest herself of this fellow who was beating her. She did have a peace bond but, under these circumstances, it seems to me that it was reasonable for her to try and get the kids home safely and that is what she did.

Mr. Lupusella: And he was drunk while doing that.

Madam Chairman: Mr. Lupusella?

Mr. Philip: He was drunk whether she took the children or not.

Mr. Lupusella: Well, it was a worse situation. I mean, he was drunk, he had the children.

Madam Chairman: He is agreeing with you.

Mr. Lupusella: You would have left the children with him?

Mr. Philip: Then I guess you are agreeing with me.

Madam Chairman: Okay, there, good.

Was there some response prior to your question or was that a statement?

Mr. Philip: Well, it was, "Do you not agree," and the answer was, "No."

Madam Chairman: Okay, thank you.

Any further questions from the Committee. None?

Are there any closing remarks you would like to make, Mrs. Scrivener?

Mrs. Scrivener: Yes, Madam Chairman. It seems to me that this case really turns on sections 23, 25. I think that there was ample opportunity for the applicant to appeal.

She was represented by Counsel, who was learned in the law and was well aware of the Dalton case; who had the aggression and the initiative required to carry a case to the Divisional Court and she did not do so and I think that that is a factor which is very important for the consideration of this Committee.

I think the other factor is that, considering all relevant circumstances, one reviews the injuries sustained by the applicant and those are balanced by the fact that the applicant did not simply scoop up her children and run for her life.

That, I would think, I would submit, is a reflex that most women would have in those circumstances. I am not speaking as a woman, but as she did not, she made voluntary decisions of her own choice over a period of many hours and I think that that also was -- those were factors that were weighed by that panel of the day.

That brings me to my final point, that this whole matter took place so many years ago in circumstances which were not enjoyed by either me or the Ombudsman.

The panel was able to examine the witness and question her at length, just as Mr. Charlton and Mr. Philip and other Members have all done this day; why did you do this and what happened then.

They had this opportunity to examine her and the witness and to listen to the presentations made by her Counsel and they arrived at their decision and I submit that section 23 applies; the decision of the Board is final.

Madam Chairman: Thank you very much.

Ms. Morrison, do you have any concluding remarks on this case?

Ms. Morrison: Yes. I will try and be very brief. First of all, I was asked earlier to explain the delays in this case and I would like, with your permission, to put that off to the time when we are talking about delays, in general. You will still have your material at hand, if you wish to address it--

Mr. Philip: Sure, that is fine.

Ms. Morrison: --but it will not take up our time today.

I think, in this case, it is clear that we agree on many things. We are under almost no disagreement about the facts and Mrs. Scrivener has said to Counsel, when he asked her, that she agrees that these were very serious injuries.

The problem we have is what are the effects of these facts and these serious injuries? I think that one of the things we disagree most strongly about, perhaps, is the amount of choice that was open to this complainant.

Mrs. Scrivener has said that she had to take

responsibility for her own actions, that she had many opportunities to choose not to have her neck broken.

I think that under these circumstances, where she was followed by her husband, as Mr. Bossy pointed out, where she could see that her husband was drunk, where her children were in danger, driving with a drunk father, that she did not have any choice.

I would not have had any choice under those circumstances. I would have had to do something to get those children out of that situation.

Mrs. Scrivener has suggested that she scoop up the children and leave. The children were ages ten, seven and four. They are very difficult to scoop up with two hands.

I think she did her best. She decided that perhaps the best thing to do was to drive all of them and to probably do it in the most conciliatory manner possible. We do not know.

She clearly could not have expected that doing that would get her neck broken and I think that is where the Dalton case gives us some guidance as to what the Court thinks the Board should do in these circumstances.

If it is a very serious injury and if the seriousness of the injury is much more than the person could possibly have expected in taking the risk that they took, then it appears to me that the Board has been told by the Court in the Dalton case that it cannot simply deny compensation altogether. It might reduce the award and we have not argued about that. It might very well reduce the award.

I think there is another point that has come out in the Board's presentation which I must say something about and that is the point of the appeal right.

The complainant did have a right to appeal and she was represented by Counsel. She was, however, as has been pointed out, living in Alberta, living on welfare, and she made an inquiry about Legal Aid and was told that Legal Aid would not be available for such an appeal.

I think it would be wrong, indeed, for us to decide that this case should live or die by the choice of her lawyer not to appeal to Divisional Court, notwithstanding the fact that the complainant would not have had to return for the trial.

The lawyer, herself, cannot make that decision to appeal. It has to be a decision of the complainant and I believe that to suggest that the lawyer really did not think the Dalton case was applicable or would have otherwise appealed, is not an inference that you should draw from that

particular decision.

We have had a difficult discussion about law and I am not going to bore you with any more of this functus officio stuff. I do think that a good point was made in the presentation by the Board that they use their common sense to allow section 25 to apply to orders of costs under section 22.

If an order of costs can qualify as an order for payment of compensation, which it appears to do, both from the fact that they allow that variance and from the pamphlets and so on that we see them presenting to the public, then we have here an order of that nature.

We had an order for hospital bills and we had an order for transportation and that section 25 variation seems to then be a much wider application than we had considered this morning. That is one possible route for a variation of this order.

There are other routes and Mr. Bell has canvassed the inherent jurisdiction of the tribunal to review its own decisions.

I believe that there is good law to suggest that a tribunal which makes an error, and I will just quote from an Osgoode Hall Law Journal article, which was published in 1979 on this particular subject:

"...that there is a situation where an agency, which fails to afford natural justice or exercises discretionary power improperly has decided in such a way to make its decision a nullity and a second consideration of such a nullity would be legally only the original exercise of an agency's power."

So there are various legal ways that you could get around the problem that the Board has suggested, about not being able to make an order to correct this injustice.

I think the other recommendations we have not dealt with at length this afternoon. I will only say that we felt these other recommendations are very important, having reviewed a number of orders of the Board, and felt that they were not consistent.

The Board has told you that every case is different. That is true. Every case is different. The reason we suggest guidelines is that different cases, which are somewhat alike, ought to be dealt with somewhat alike.

I think that looking at a lot of Board decisions, we feel there may be some inconsistencies and that some guidelines to the exercise of the discretion that is

undoubtedly allowed the Board under section 17 would be helpful. We ask that you support the Ombudsman's recommendations in this case.

Thank you.

Mrs. Scrivener: Madam Chairman, on a point of order, I am a little concerned that you have been told that we use 25 to pay costs.

I can assure you that costs are paid under section 22; that on very rare occasions, when costs have been paid and everything has been concluded, in order to provide for additional costs, we look the other way and use 25 because we have to satisfy the auditor. But it is rarely done and my registrar informs me it has never been done on a denial because we have never had that kind of a situation. So I really feel that this is -- I just want to correct the record on that.

Madam Chairman: Thank you very much.

Mr. Bell?

Mrs. Scrivener: The other factor is, we, in requesting documentation for the file, if there is a solicitor, we request the solicitor to do this on behalf of the applicant because it saves us taking a power of attorney and doing all of those things, but therefore, we are responsible, then, to pay for them.

Madam Chairman: Thank you.

Mr. Bell, you had one question?

Mr. Bell: Ms. Morrison, hypothetically--

Ms. Morrison: Yes? .

Mr. Bell: --if this Committee should decide to support the Ombudsman's recommendation, how in the heck is it going to be implemented?

Ms. Morrison: I suggest, Mr. Bell, if the Board has the power, as it says it has, to change its orders of cost in the way it suggests it does by using section 25 in a humane way, as has been said, there is no reason why they could not change this order in the same way.

If that is not possible, there are other things which this Committee could recommend. If, for example, this Committee feels, as it might, that section 25 is too narrow, that section 25 ought to explicitly give the Board the power to vary a zero order, it may, perhaps, suggest an amendment of that. But as you discussed with Mr. Zacks this morning,

there are other ways in which an answer to this specific problem could be arrived at.

The Board might agree to an appeal in which its order would be quashed and then it would have to reconsider the matter.

Mrs. Scrivener: On that particular point, if I may, I queried the Crown Law Office on this matter before I wrote a letter to the Ombudsman about it and I suggested to the Ombudsman that if he felt strongly about this matter, that he could recommend to the applicants that they appeal. And the Crown Law Office has assured me that if an appeal were forthcoming, late as it is, they would make no difficulty before the Divisional Court accepting the appeal.

Mr. Bell: You mean on the late filing of the appeal?

Mrs. Scrivener: Yes.

Mr. Bell: Can we take it a step further? If an appeal were launched in that way, would you be so disposed to consent to an order, setting aside the original decision and sending it back to the Board?

Mrs. Scrivener: I have not discussed it, so I could not possibly give you an opinion.

Ms. Morrison: Mr. Bell, I just might say, I think still there is very good argument that the original decision was a nullity, taken as it was in contravention of the Court's view in the Dalton case and, if that is the case, I think there is good law that says that they can reconsider it as an original consideration.

Mr. Bell: Well, I wish I -- I am not sure that it is that clear-cut; in fact, I am certain that it is not.

So as not to cut you and your office off, there was mention made this morning of a second memorandum of law that was prepared on the subject. Is that available now?

Ms. Morrison: Yes.

Have you got it with you?

Mr. Bell: What if this Committee should conclude that there is not such an inherent jurisdiction, as you argue?

Ms. Morrison: Then we believe one possible route, although it is cumbersome, is to get the Board to consent to an appeal and to have the Court give the required order to quash the original decision and have it reheard.

Mr. Bell: Okay.

Ms. Morrison: Sorry.

Madam Chairman: Sorry you asked, right?

Mr. Bell: No further questions.

Madam Chairman: I had thought that memoranda usually are 10 pages or less.

Are there any more questions from the Committee? We still have one more case to hear with the same parties, but with different facts, same jurisdictional question.

"Not today"? Is that what I heard from Mr. Philip?

Mr. Philip: Well, I think a number of us that are Metro Members have commitments in terms of our riding offices on Wednesday evenings for historical reasons.

The House usually did not sit on Wednesday and that is normally when we have our multitudes of constituents lined up to see us.

I certainly am not prepared to sit past six o'clock, but I would prefer to sit not very much past five or otherwise I do not get any dinner on my way to my riding office.

I am perfectly prepared to sit on any other evening, but I am not prepared to sit on Wednesday evenings.

Madam Chairman: Okay. Well, let's then just decide this one and we will see how quickly that goes. The Committee will sit and make a decision at this time and we ask that you make yourselves available. Do not leave. We will go in camera.

Thank you.

The committee continued in camera at 4:25 p.m.

STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1986-87

THURSDAY, JANUARY 28, 1988

Morning Sitting

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
Charlton, Brian A. (Hamilton Mountain NDP)
Henderson, D. James (Etobicoke-Humber L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Black, Kenneth H. (Muskoka-Georgian Bay L) for Mr. Bossy
Johnson, Jack (Wellington PC) for Mr. Pollock
Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Morrison, Gail, Director, Investigations
Zacks, Michael, General Counsel

From the Criminal Injuries Compensation Board:

Scrivener, Margaret, Chairman

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, January 28, 1988

The committee met at 10:10 a.m. in committee room 2.

Madam Chairman: Okay. We will call today to order.

Mrs. Scrivener, could you come and sit at the front again, please? Thank you very much.

We are dealing today with the case of Mr. B, and it is under Tab V in the book. Also remember that the recommendation Section 22(3) letter is enclosed under U on some people's tabs, and some of us have the additional information booklet.

This morning we would like to have both the evidence presented and the decision-making process over by 11:30. We would appreciate it if you would keep that in mind when you make your presentations, and given that we have already dealt with, to a certain degree, the arguments with jurisdiction and with Section 25 and -- well, Section 17 may still need to be discussed on this one, but if you could just keep to the evidence that is pertinent to this particular fact situation and we would appreciate that.

Ms. Morrison?

Ms. Morrison: Thank you. Good morning, Madam Chairman and members of the committee.

I am going to try and be very brief because I feel that the facts in this are fairly straight forward. In fact, I think one of the difficulties with this case is that we do not have any facts that the Board decided upon.

I will take you first of all to the Board Order at page 30 of your materials. The Board Order sets out the facts as told to them by the applicant. Essentially, the applicant's story was that he was out drinking one evening, drank with a man and a women at a hotel, subsequently told them that he had more alcohol available, and they drove him to a residence in his car.

His story is that that man and women went upstairs in that residence and that he was so drunk he lay down on the chesterfield and fell asleep. Sometime later in the evening, an assailant broke into the apartment or house and beat him up. That is his essential story.

The other account that is given in the Board Order is the one by the investigating police officer who said that

the man and women had been drinking together in two hotels and then went to the woman's house to have sex. The police officer says while he was at the woman's house, the applicant was attacked by the offender who had previously been the woman's common-law husband but was separated from her at the time. The policeman did not say how the offender had gained entrance to the house.

The Board did not make any finding of which of those sets of facts applied. The Board just set out the applicant's story and then they set out the policeman's story, and then the Board's finding was:

"The Board has carefully considered all the evidence presented and all the facts surrounding this application and in particular the intoxication of the applicant, and therefore this application is denied."

So the one finding of fact that the Board made was that the man was drunk.

If we look -- and I do not want to bore you with law this morning because I know you had lots of it yesterday, but even if we look just for one second at the Dalton case which you have in your materials at page 20 -- page 19, sorry. On page 20 of that -- sorry.

On page 18 of that case, you will see at the very top of page 397 that the court would not interfere with the Board on its findings of fact, but the court certainly assumes that the Board did make some findings of fact. Essentially, they say, the Board was able to reach the factual conclusions it did on the basis of the evidence that was before it. Consequently, we are unable to interfere with the findings of fact that it made even though others may have come to a different conclusion on the evidence adduced. Here, the only finding of fact that Board made was the fact that Mr. B was intoxicated.

Intoxication alone cannot be enough for Section 17 to kick in and deny the applicant any compensation. The reason I say that is that if you think of some facts in which intoxication alone is involved - someone is intoxicated in his house, for example, the doorbell rings, he goes and opens the door and someone beats him up - I think that it would be hard to suggest that he was the author of his own misfortune because he was intoxicated.

Another situation: A person is intoxicated and goes into the bank. While he is in the bank, a bank robber comes in. In the fray, the bank robber says, "Everyone put up their hands," and shoots the guy who is intoxicated. It is hard again to think that the intoxication alone would be enough for Section 17 to prevent that person from being compensated as a victim of crime.

The person's story here was that he was sitting in a living room drunk. The Board did not make a finding as to whether that was true or not, but it is possible it was true.

If that was true, then I suggest to you that the only finding of fact, the intoxication fact, should not be enough for Section 17.

Suppose, however, that we give absolute benefit of the doubt to the Board's decision and suggest that the facts were the worst possible facts. Suppose we agree with the investigating police officer's version of fact: This guy picked up someone in the bar, took her home, was in her house, her common-law husband came in and beat him up.

We still have to worry about the risk that he thought he was taking. It does not seem that he would have been able to foresee if he picked up someone in the bar that he was going to end up getting beaten up.

Now, it may be that he was an immoral person, but Section 17 does not say immoral people do not get compensation. The behavior has to have something to do with the beating up or the injury. It cannot just be any immoral behavior.

The Dalton case suggests, in fact, that you have to weigh the risks taken against the seriousness of the injury. If you go to the medical reports in this case which are - sorry, we will get there. Excuse me. Yes, which begin at page 24 and go through 25 and 26 and 27 of your materials, you will see that this man suffered serious injuries.

He was, according to his report to the doctor, "knocked down, subsequently kicked many times about the head, neck, chest and arms." This is on page 24: He had a cut over his forehead which required three sutures. He had contusions and bruising of both ears, his right cheek and very sore over his left shoulder.

X-rays showed a fracture of his right zygomatic arch, that is his right cheek bone, fracture of his nose bone, fracture of his left clavicle, which is his collar bone just at the joint. The fracture of his cheek bone disrupted the middle branch of his right facial nerve and he had a persistent numbness of his right cheek and upper lip which was improving.

At February 8th, 1982, which is some couple of months after the injury, he still had an amount, a fair amount, of discomfort in his left shoulder from his broken collar bone. He was still numb over the right side of his face, had noises in his head resulting from the kicks to his ears, and

although the multiple bruises had healed well, his nose was deviated.

Mr. Philip: Nose was what?

Ms. Morrison: Deviated, because it was broken. A later report which is a report from July which is some seven months or more after the injuries, he still has problems. He still has problems with his shoulder. He considers himself disabled by his shoulder. In fact, the reason he could not go back to job as an iron worker is that he could not raise his arm properly above the shoulder once he had had that broken shoulder bone.

These are serious injuries. I think if any of us had injuries which seven months after the time we had them we still feel dizzy, disabled and so on, would feel that we had been seriously hurt.

Moreover, if we go to the Dalton case, we have to balance the seriousness of the injuries in some ways against the risk that he thought he was taking. In the Dalton case they suggested that she was injured so seriously that she could not possibly, when she was taking the risk of getting in the car with the people, have thought that was going to happen to her.

Now, here is the man in a bar picking up a women or perhaps going home with a man and a women -- we do not know which. Could he at the time he did that have been taking a risk that he would get beaten? Could he have foreseen that that was what was going to happen to him? I suggest that it is very difficult to see that he could foresee that.

The Board yesterday argued that their position on Section 17 is that people must be responsible their own actions. Now, I think that we could agree people must be responsible for their own actions, but you can only be responsible for what you can foresee.

It may be true that if you get drunk and do something really stupid, you can foresee that you are taking some chance and you may have some problems. I do not think in this case it can be suggested that going to the hotel, getting drunk, picking up with these people, this man could say to himself before he went home with them, 'I am taking a chance that I am going to get beaten to a pulp. How would he know that? How would he have thought that that was going to happen to him?

I suggest this is not a case where the Dalton decision -- sorry, I suggest that this is a case where the Dalton decision which suggests this weighing of risk against seriousness might assist you in assessing the Board's result. The Board suggested he get nothing. The only

finding of fact they made was that he was drunk. I think that, first of all, they did not find any facts on which to base their decision, and secondly, even if we thought that what they found were the worst possible facts, even those worst possible facts would not argue for the result of nothing.

We have never suggested in our report of course that in taking into account Section 17 they could not reduce the award. They might have been able to do that. What we have suggested is that it is inappropriate for the award to be zero.

Thank you.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Yes. Ms. Morrison, I am having difficulty understanding what the Board's position is in this. You stated that you are taking a very liberal interpretation that the individual in question who did not know any of these people, the two people involved, and he went home with them and all the rest of it, but there was no way that he was responsible for his actions.

I feel that you believe what he is saying, but yet it says in page 2 of the report from your office that the Board accepted the version as events as presented by the police constable who investigated the incident and the police report, the bottom line is that the two were in bed.

Well, how do you say on the one hand that you have a tendency to believe the individual and yet the Board has accepted the version of the police officer?

Ms. Morrison: I did not suggest that I believed him. I just suggested that in the Board Order itself, the Board did not find that either one of those versions of fact was true.

Mr. Johnson: Well, I would like this Committee to be clear on this case. Either we accept the police constable's or the police officer's report or there is some element of doubt, but your Board accepted the version as offered by the police.

Ms. Morrison: No. I am suggesting, looking at the Board Order, that, in fact, that statement in our report may be somewhat inaccurate. It is difficult to tell from the Board Order what they accepted. If you read the Board Order it does not say this version is true or that version is true. It just gives both versions.

Mr. Johnson: But dealing with Section 17 which says quite clearly that an individual has some responsibility for their own problems, and I submit that if the Board in this

report has accepted the version of the police officer --

Ms. Morrison: That is the Compensation Board, yes.

Mr. Johnson: You are disagreeing with that?

Ms. Morrison: That suggests that the Board, the Compensation Board accepted --

Mr. Johnson: Did you interview the police officer?

Ms. Morrison: No.

Mr. Johnson: Why would you not?

Ms. Morrison: We were reviewing the Board's decision based on the evidence the Board had before it.

Mr. Johnson: Well, I think the key or one of the keys in my opinion is accepting whether indeed the two were bed, and if they were in bed or if he was on the couch, it is entirely different. It says that he was attacked without provocation.

Ms. Morrison: Yes.

Mr. Johnson: Now, there is quite a difference if he is sleeping on the chesterfield or if he is sleeping in bed within an individual.

Ms. Morrison: But I am suggesting to you that Section 17, even if he were in bed with the women --

Mr. Johnson: Yes?

Ms. Morrison: -- that Section 17 suggests that he had to know ahead of time that that behavior would get him beaten up. Section 17 says his behavior has to contribute to the injuries.

Mr. Johnson: Okay. In the last case we had, you made constant reference to the fact that he was from a small town.

Ms. Morrison: Yes.

Mr. Johnson: Is this by any chance a small town?

Ms. Morrison: A relatively small town, I would say.

Mr. Johnson: Well, I think most people in small towns have a fair idea of what is going to happen with them if they go home with strangers and go to bed with someone else's wife.

Ms. Morrison: Sorry. Not a very small town, a fairly sizeable city.

Mr. Johnson: Well, not very small towns, maybe they are not as knowledgeable about the facts of life.

Madam Chairman: Mr. Philip?

Mr. Philip: Is it not true that this is not someone else's wife; in fact, it was someone else's estranged wife and therefore he would have no knowledge?

Ms. Morrison: There is no particular reason to think he knew that this person was connected to anybody. There is no evidence to suggest that he knew that she had someone waiting around the corner to come home and beat him up. If you pick up a woman in a bar, she probably does not tell you those kinds of things.

Mr. Johnson: But you sure as hell are going to ask if you do not want --

Ms. Morrison: Do you think that he would have thought if he did not ask that he would get beaten up?

Mr. Johnson: Listen, if he did not, he is a damn fool.

Madam Chairman: Any further questions from the Committee on this?

Mr. Morin: Was the women questioned?

Ms. Morrison: Was she?

Mr. Morin: Questioned at all by the police?

Ms. Morrison: Can you just wait until I find the investigator's report on the file from the Board file. The investigator's report suggests that the investigator spoke to the policeman who gave him a version of the story. I cannot say that he spoke -- I think he spoke only to the policeman, from this report.

Mr. Morin: She should certainly determine who she slept with.

Mr. Philip: Depends on how much she had to drink, I suppose.

Mr. Morin: You know, to determine if he was on the couch downstairs or if he was in bed with her.

Ms. Morrison: Well, the investigator from the Board spoke to the police, and the policeman gave you the version of the facts that is in the Order, essentially that he was

out drinking with this woman, that they went back to her residence, that they went to bed and that her common-law, estranged common-law husband, friend - whatever you want to call him - came in and beat him up. That was the police constable's story.

The investigator from the Board talked to the police constable but he never talked, as far as I can see from this, with the women involved.

Mr. Morin: Had he talked -- I am just asking you. Had he talked to the woman, do you think the story would be somewhat different?

Ms. Scrivener: She is quoted in paragraph 4. She told the investigating officer.

Ms. Morrison: That is right. The investigator officer is the Constable X.

Mr. Johnson: What page is that?

Ms. Morrison: You have not got this investigator's report. It is a report that was on the Board's file.

Mr. Johnson: Would you mind reading it into the record?

Ms. Morrison: Sure. I can read it into the record.

"I have spoken to Constable X by telephone. He was one of the investigating officers in this matter."

That is a report by a Board investigator, not our investigator.

"I learned from Constable X that the applicant on the night in question had been at the (such and such Inn in such and such a city) where he had met Y, (the woman), of (and the address of the woman).

"The two went from the inn to the X hotel where they shared a few drinks. Y, the women, invited the applicant back to her residence, to which he agreed. At the residence, Ms. Y informed the applicant that she was a single mother and that she wished to have sex with him.

"The two were in Ms. Y's bed when the offender came in and found them. He immediately attacked the applicant, striking him several times about the head with his fists and causing the injuries to the applicant which were described before this Board."

And that is all reported as being learned from the police

officer.

"Constable X learned that the offender and Ms. Y had been living in a common-law relationship prior to the assault. She told the investigating officer that they had recently separated and that she no longer wanted to see the offender."

The officer was unsure whether the offender was able to gain entrance with a key to the house or whether the door had been left unlocked. Constable X believes that the offender and Ms Y were, in fact, separated at the time of the assault. However, at the offender's trial it seemed to the officer that the two were again cohabiting.

Mr. Morin: Had they been separated for a long time?

Ms. Morrison: It does not say.

Mr. Morin: Does not say.

Ms. Morrison: The offender has a lengthy criminal record and is known to the police for acts of violence. The applicant, that is Mr. B, had no previous police involvement. According to Constable X, the applicant had been drinking on the night in question, but the officer determine his degree of sobriety because of the injuries he had incurred. Apparently the victim was unconscious when the officers first arrived.

One of Ms. Y's children who was present in the home had called the police.

Mr. Morin: And he entered the room forcibly, apparently?

Ms. Morrison: The police?

Mr. Morin: The offender.

Ms. Morrison: It did not make any finding about that. They did not know.

Madam Chairman: Mr. Johnson?

Mr. Johnson: I am not sure if it has any bearing on the case. Maybe Mr. Bell could help me. It makes reference to the former common-law husband. I understand under our legislation that if a man and wife live together for three years it is considered a legal marriage?

Mr. Bell: Well, to some degree. There is a definition of spouse under the Family Law Reform Act and length of co-habitation can determine spousal rights, the effect of which is in law substantially no difference.

Mr. Johnson: The reason I ask is I feel it would be substantially different if they had been living together for a short period of time or if indeed he did consider that it was, while not a legal marriage, certainly of that nature. Because I know under our legislation they receive all the benefits of a legal marriage.

Ms. Morrison, you had actually checked to determine the length of their common-law relationship?

Ms. Morrison: I have not; I am sorry.

Mr. Johnson: Okay.

Madam Chairman: Mr. Philip?

Mr. Philip: Ms. Morrison, would you agree that the length of the common-law relationship or indeed even if they were married would have no relevance since all that the claimant was basing his actions on was the fact that she in fact said that she was not involved in a relationship at the time, and that is according to the police testimony?

Ms. Morrison: We have no information at all what Mr. B knew about Ms. Y. I would be very surprised if he went home with her knowing that she had a common-law husband who was known to the police as a violent person. If she said that to him and he then went, maybe that would be a different thing.

We have no information about that at all, and it does not seem to me it would matter if they were married or sister and brother or what the story was. If he had no way of knowing that that person existed -- and we do not have any information on that nor did the Board have any information on that.

Mr. Morin: Would the history of the other guy be important in this case?

Ms. Morrison: The history of?

Mr. Morin: The one who was beaten up?

Ms. Morrison: Mr. B?

Mr. Morin: Yes.

Ms. Morrison: Yes. The police said he had no history at all.

Mr. Morin: None, whatsoever.

Ms. Morrison: His marital status at the time was he was a widower.

Madam Chairman: If there is no further questions at this point, perhaps, Mrs. Scrivener, you can make a presentation on behalf of the Board with regard to the facts in this case.

Ms. Scrivener: Thank you, Madam Chairman. Just before I commence, I would, on a point of order, like to clarify any misunderstanding which may have arose yesterday about orders as to costs. My registrar and I are both concerned that we may have left some kind of misconception with the Committee.

Orders as to costs on denials are always paid under Section 22. Always. And you have an example in this morning's application that you are dealing with in as much as there was a variation, and you will note that in the variation the reference is: "The Board therefore orders payment of the following outstanding account..." It was an account which had been overlooked and was then subsequently submitted, and it was paid under Section 22 of the Act.

Madam Chairman: If the costs are varied that is where I understood that Section 25 might be implemented, if the costs have to be varied or added to in subsequent times.

Mrs. Scrivener: Section 22 provides that the Board may with respect to any hearing or other proceeding under this Act make such order as to costs as it thinks fit. And that is the case in all denials, because there is no means by which under a denial one could go into Section 25, and it is never done. I just want to be sure that that has been clarified. We can use 25 for anything in which there has been an order as to compensation but not for a denial.

Now, Madam Chairman, my first order of business this morning has to do with the receipt of a copy of Hansard of your opening meeting last week on Tuesday, January the 19th, at which time your counsel instructed the Committee as to the Act for the Ombudsman and its interpretations, procedures and so forth.

And on page B-12 of that report of Hansard, far down on the page there is this sentence. It is in paragraph six. Midway in that sentence, he is discussing how -- he says: "What do you do when you receive one of these Recommendation Denied Cases?" and so forth. And in that discussion he says, "...you --" that is the Committee, "-- during your inquiry of the matter will ensure that the Ombudsman has complied in every respect with his legislative requirements."

And earlier in the afternoon on page B-7 just at the bottom of the page where he had been discussing with you the section under 15, the function of the Ombudsman is to

investigate, and the four factors, he comes to a section about 15(1) and (2), and then he says:

"Now, how does he do that? Well, first of all if you will just flip over to Section 17, there is a technical requirement in the Act with some minor exceptions that every complaint to the Ombudsman shall be made in writing. But before he can initiate it, before he can do anything other than a self-initiated complaint, he has to receive a written record of same."

So having said that, Madam Chairman, if one looks at the Ombudsman Act on Section 17, it says very plainly: "1. Every complaint to the Ombudsman shall be made in writing." That seems quite clear, and I suspect that the Ombudsman is bound by his Act as I am bound by our Act.

And so I look at the information that you have before you in the material supplied by the Ombudsman, and although in yesterday's application you did have a handwritten letter from the person who was making the application to the Ombudsman, in today's application all you have is a reference from the manager of the office in Thunder Bay who reported that the complainant had come in and had lodged his complaint.

There is no application from the complainant and there is no signature in any way, and I ask you, Madam Chairman, to define for me: Is this matter properly before the Committee?

Madam Chairman: Did you ever raise this problem with the Ombudsman before right now?

Mrs. Scrivener: No because I only got this -- well, I actually read it on Monday and I have had no opportunity at all because you cannot get copies of Hansard very quickly.

Mr. Philip: But your staff have had it for months.

Ms. Scrivener: Pardon?

Mr. Philip: Your legal counsel did not raise the issue either?

Ms. Scrivener: Well, we had to ask for the material from the Ombudsman from the Clerk in the first instance which arrived in our office last, I think it was Thursday. And I just went through it in the normal way looking at it, and I was not that familiar with the Ombudsman Act.

When I received a copy of Hansard on Friday, I took it home to read on the weekend and I did not really get that far into it. And when I finished reading it on the Monday, I began to wonder about this and so then I went back and

reviewed and I find that there is not any written --

Madam Chairman: Thank you very much. Maybe we could address that problem about the written record.

Ms. Morrison, is there some written record from the complainant?

Ms. Morrison: Yes. I can perhaps clarify our procedures.

When we have someone come into one of our intake offices, we take a memorandum of their concerns. We then fill out what is called our complaint summary form, which sets out the person's name and address and so on and is the file's face sheet, and we have the complainant sign the bottom of the form to confirm the contentions which are listed on that complaint summary form. We have the signature of this complainant on this form.

As was pointed out, this matter was not raised before, but the Board might not have been aware of the Ombudsman Act's requirement that things be in writing, although if they were going to resist our jurisdiction to bring this to the committee, they might have checked that ahead.

Madam Chairman: Thank you. Mr. Elliot?

Ms. Scrivener: I am not resisting. I am just raising the question before the Committee to give me guidance.

Madam Chairman: I think we accept that that is a complaint in writing and that it merely has not been submitted in the record because it is not pertinent in this detail, and we accept that you have gone through the necessary procedures to qualify under Section 17 of the Ombudsman Act.

Mr. Elliot?

Mr. Elliot: That was my comment, too. I think that, with due respect in this situation, the Committee feels the case is properly before it, and I would appreciate it greatly if you would address the case from your point of view.

Mrs. Scrivener: Madam Chairman, I would draw to the Committee's attention once again that this matter was dealt with on application to the Board. It was duly documented and placed before a hearing panel which was properly constituted and advertised, and the Board hearing was properly conducted.

The whole matter of the time element enters into this again. There is a terrific time warp; that is to say the date of the offence was December 15th, 1981. The hearing

was held in December of 1982 and the decision handed down in that month, and we are dealing with something now which is years old.

And so all of the factors that affected the judgment and the opinion and the decision-making of that original panel are factors which are not able to be repeated at this time and they certainly were never experienced by me nor by any member of the Ombudsman's office. Only those panel members at that time were able to review all of the documentary evidence before them, the conflicting report from the investigating officer, to discuss with the witness and to hear what we had to say about the events of that night and so forth.

And in this, I think they wrote an opinion which in one sense can be debated, but in another sense, does what they intended to do, and I will address that in a few moments.

My second point is that the Ombudsman has been in consultation with the applicant's solicitor, and in his opinion report, reference is made to the fact that there was some improper conduct on the part of a panel chairman.

Madam Chairman: Do we have that documentation before us?

Mrs. Scrivener: Yes; it is contained in the opinion.

Madam Chairman: Can you help us with what page number that is.

Mrs. Scrivener: This is the opinion of December 17th.

Ms. Morrison: It is at page 4 of our report.

Madam Chairman: The 22(3) report.

Mrs. Scrivener: The reason I am raising this to you is twofold. One, Mr. B was represented by able counsel who --

Mr. Bell: Sorry. For a moment. Can we ask Hansard to delete the lawyer's name, the name that we just heard.

Madam Chairman: Yes, there was a name mentioned in there. There was a name mentioned in there, if you could delete that.

Ms. Scrivener: The applicant was represented by an able counsel who, if he had felt that Dalton was a factor in this case, could have appealed to the Divisional Court. But on the matter of the complaint that he has registered with the Ombudsman at this very late date concerning the conduct of the panel chairman, a person who is now deceased, I think that that also was sufficient cause for him to raise an

objection either to the Divisional Court or to our Minister as to the conduct of the hearing.

No such objection was ever raised that I know of, nor was an appeal made to the Divisional Court.

Mr. Elliot: I am not sure where we are in this.

Madam Chairman: It is page 4 of the Section 22(3) letter from the Ombudsman dated December 17th, and it is on page 4, first and second paragraphs.

Mr. Philip: What page is that?

Madam Chairman: It is under Tab U unless you have the supplementary report.

The confusion arises that some of us have additional and some of us have it in our books. Page 4.

Ms. Morrison: The same information is found on page 48 in the 19(3) letter, 48 of your material.

Madam Chairman: Okay.

Mrs. Scrivener: Frankly, unprofessional conduct of this type is just unheard of for our Board, but if the solicitor felt he had reasonable grounds to raise this to the Ombudsman even so many years later, then I think that if it had happened at that time, he should have said something and he did not.

Mr. Bell: Mrs. Scrivener, could I help - and Ms. Morrison, as well - during the hearing this anecdote is alleged to have happened before the hearing started. Did the complainant's counsel raise the matter of the discussion and its implication before the hearing started or at any during the hearing?

Mrs. Scrivener: He did not. I never discuss with my board chairmen the way they have conducted a hearing or anything of this nature. But I did ask the sole surviving member of this panel about this charge, and she was with the deceased panel chairman prior to the hearing, during the hearing, they had another one afterwards, and she says there was no opportunity for this to have been done because she was present.

Mr. Bell: All right. And, Ms. Morrison, do you have any information as to whether counsel raised it at the hearing?

Ms. Morrison: We do not have that information, Mr. Bell.

Mr. Bell: Are we entitled to presume then it was not raised at the hearing?

Ms. Morrison: I think we might be.

Mr. Bell: Members of the Committee, I do not think you have to concern yourself with it further because what we are talking about is bias or a reasonable apprehension thereof, and the law is fairly clear that as soon as the apprehension is there, it had better be raised at the first opportunity; otherwise you are generally considered to have waived it or acquiesced it or deemed that it does not exist.

And I do not think it is useful for the Committee or anybody else to engage in a debate whether or not V displayed any bias. If it was not raised by counsel then or after, it should not be raised again.

Mrs. Scrivener: Well, I raised it because it was contained in the Ombudsman's report, and --

Mr. Bell: You are correct in doing so, but --

Mrs. Scrivener: -- and because the right of appeal was available to this applicant and his counsel and it was not exercised, and the appeal could have been conducted -- could have been sought. And I think that whereas yesterday the matter was raised in terms of the financial difficulties affecting that applicant, I think financial difficulties might have been less a factor with this present applicant.

I come now to this matter raised by Mrs. Morrison in terms of risk. Yesterday I had something to say about the acceptance of the individual of the responsibility for his actions. In this particular instance we had rather a good example of responsibility being accepted by the applicant, and it is contained in the Board Order referenced to the fact that the applicant said that he gave his car keys to the man he met in the bar - that was the stranger - as the applicant said he was far too drunk to drive. That is by any standards either five years ago or now a very responsible action.

Having done that, he apparently then was willing to, or was less than prudent, in that he was willing to risk his car and his personal safety to strangers. He made decisions. On the one hand he said he was too drunk to drive; on the other hand he really did not care if anything happened to his person because he placed himself in that position.

Similarly, he made another decision. According to his testimony, he said he was too drunk to walk home, and obviously he could not have been very far from his home if he felt that he could have walked there, and the community

from which he comes is a relatively small community.

So I raise those matters to you, Madam Chairman, because I think they are relevant in terms of what the Board members had to do when they were evaluating all relevant circumstances in this particular instance. However, I said earlier that I would give you what I think -- what is my insight in terms of this Board Order.

Mrs. Morrison has identified the fact that the Board Order is inconclusive. The Board panel was not judgmental. It did not say, "You are lying" or "We discount this." They left it open and I think deliberately so.

They were kind to this man. They knew they were going to deny him. They did not really want to say specifically that he had erred in his conduct in any way. They knew that he came from a small community. They were kind to him by just saying the events of the evening -- the applicant's recollection of the evening is hazy due to his inebriation. And in the community from where he came, inebriation was not an unusual thing. That is common to many communities, but in his community certainly it was not.

So they left it that way. I think they were being kind to him. That is the best interpretation I can put on it because in point of fact I think they were duty-bound to point out the discrepancy between his position and the position of the investigating officer.

Madam Chairman: Excuse me, we have a point of order. Mr. Black?

Mr. Black: I wonder, Madam Chairman, if I could get a clarification of what I think I heard but perhaps did not hear. That was a reference to the community.

Could that be repeated or could Hansard pick up what was said and repeat it for me?

Mr. Bell: Mrs. Scrivener could repeat what was said.

Mrs. Scrivener: Well, his community was a small community, but it was large enough to have a number of pubs and bars, and therefore for a person to be inebriated in that community was not so unusual as it might be in a very very small -- in a village, for instance.

I mean, once you get between a middle-sized community and a large city, inebriation is not considered to be an unusual thing. I do not think so. It is quite commonplace in some instances. I think that in a very small community, inebriation is something that is noted by many people; I think in a larger community, it is not so noteworthy.

Mr. Black: I guess I find your reference, it is -- it would appear to me that inebriation is well known in most communities, and I perhaps mistakenly assumed that you were suggesting this particular community was more accustomed to inebriation than other communities might be. Was that the intent of your comment or not?

Mrs. Scrivener: No. I think that I have made an unfortunate use of words. I am sorry.

Mr. Black: All right.

Madam Chairman: Please continue.

Mrs. Scrivener: Therefore, I think, Madam Chairman, the panel, in preparing this Board Order, performed a duty and did it as tactfully as they could to provide the least possible hurt to the applicant. That is my view of this Board Order.

Madam Chairman: Thank you. Mr. Philip?

Mr. Philip: Mrs. Scrivener, when someone makes an appeal to anybody, do you not feel that they understand that the results of making that appeal is that facts are going to be found and that facts are going to be stated. And do you not feel that a tribunal of any kind, a quasi-judicial body, has the responsibility to let the chips fly where they may but at least give a statement of reasons and facts as to why they found in a certain direction?

Surely that is far more important than the kind of innuendo that can stem from not stating what the facts were and not stating what the findings were.

Ms. Scrivener: I suppose you might think so, Madam Chairman, but this is not always the way it works. Sometimes people can be naive and they can make an application to the Board, and then we have actually had people who, upon arrival at a hearing, have observed the investigating police officer present and have simply left the hearing and have refused to proceed, and they have withdrawn.

Mr. Philip: That is their choice.

Mrs. Scrivener: Yes, but you suggested that --

Mr. Philip: This man chose to go through with --

Ms. Scrivener: -- expect to let chips fall where they may.

Mr. Philip: Well, this man chose to go through with this application on the assumption that whatever the

decision was that there would be reasons given for that decision. Do you not think that he has the right to know why he is being denied, and do you feel that you have given him adequate reasons for the denial?

Mrs. Scrivener: I do not know, but I can only suspect that the hearing officers felt that he probably knew all the reasons. But I do not know; I cannot interpret anything beyond the fact that I have given you what I thought was my insight, that they were attempting to be kind.

Mr. Philip: Well, if he knew all the reasons, then it seems very funny that another investigative body, namely the Ombudsman, could not find a clear statement of reasons in the decision by your Board.

Mrs. Scrivener: Oh, it is quite clear. They have cited Section 17(1) of the Act, and in terms of what they heard and learned, they arrived at that conclusion.

Mr. Philip: And under Section 17(1) of the Act, do you not feel that you have an obligation in your decisions, in writing those decisions, to be fairly specific as to what behaviour on the part of the applicant led to the lessening, and I would suggest that 17(1) suggests that you can lessen, not deny, but be that as it may, the application.

Mrs. Scrivener: I think that they felt that they said it in the final paragraph.

Madam Chairman, who knows how this Board Order would be written today. If the hearing were to take place today and be written this month, somebody else might deal with it in an entirely different way. But this is the way it was dealt with at that time on the basis of what they saw and heard, and there is no way I can speculate beyond the simple insight I have given your committee.

Madam Chairman: Any further questions at this point? Yes, Mr. Lupusella?

Mr. Lupusella: On a point of order, Madam Chairperson, I do not think that this Board is different from any other quasi-judicial board which has existed in the province of Ontario. And to be fair to the statement which has been brought to us by the Chairman of this Board, I think that the Workers' Compensation Board is not coming out with clear decisions to explain why certain claims have been denied at the Board's level. And I think that we heard from the Workers' Compensation Board that they are trying to improve the system.

So I do not think that we have placed on the spot this particular board when, in fact, other quasi-judicial boards are following the same pattern.

Mr. Philip: Well, with respect, I know of no decision by the Workers' Compensation Board - and we have dealt with a number of them that we have turned back here - that is as vague as the decision that is contained here.

Mr. Lupusella: They are the same.

Madam Chairman: I think each order in and of its own way has been worded ineffectually.

Mrs. Scrivener: I know these hearing officers. I think that they were capable of writing exceedingly lengthy, precise Board Orders had they decided.

Madam Chairman: But what we are saying, in this instance, and it has been noted that this one is perhaps not as identified as we would like.

Mr. Black?

Mr. Black: Madam Chairman, the point I would make is that I do not believe that this is the real issue here. The question of whether the report was written in vague terms, the question of motivation of the panel is not the issue in my opinion.

Madam Chairman: Thank you. Mr. Bell?

Mr. Bell: Mrs. Scrivener, you may want to ask your counsel who I see is here in the audience this morning to assist you with these couple of questions.

Can I ask you to turn to the Board Order dated December the 1st, '82, in your material. It is page 30 of your material, members, and also, Mrs. Scrivener, the Order issued on June the 24th, '83, the one that deals with the cost.

Will you agree with me that the December, '82, order does not deal at all with the question of the man's injuries or their severity?

Mrs. Scrivener: That appears to be true.

Mr. Bell: And will you agree with me - I think you will after our discussion yesterday about Dalton - whatever you and the Board believe Dalton stands for, it certainly stands for the principle that you have got to consider the injuries and the severity. You are nodding your head yes?

Mrs. Scrivener: Yes.

Mr. Bell: And you may wish your counsel's advice before you answer this one. Would you agree with me that it is a

reasonable conclusion on the face of this order that you have not done what Dalton said to do?

Mrs. Scrivener: I do not know what Dalton said to do. Dalton addressed a particular appeal. From that decision, certain principles arise, but it was a matter of taking into account all relevant facts and the extent of the injuries being one of those relevant facts.

In here on the last paragraph it says, "The Board has carefully considered all the evidence presented and all the facts surrounding the application."

Mr. Bell: I see that, but I think your counsel will advise you that that is not good enough for the Divisional Court. You cannot merely say that. Where the Divisional Court says that there is a fundamental issue you have got to consider in all of these cases, you had better show on the record that you have done it. My line of questioning is just to get your comment that it appears that you have not done it.

Ms. Scrivener: That is a matter of opinion.

Mr. Bell: Okay. But it is a reasonable conclusion to draw examining the Order against --

Mrs. Scrivener: Not necessarily. You were not there.

Mr. Bell: Well --

Ms. Scrivener: You do not know why this was written in this way.

Mr. Bell: No, but we only have the order to assist. That was a two-way street.

Mrs. Scrivener: Yes.

Mr. Bell: Can you tell me, turning to the second Order, the June 24th, '83, order, why does the Board call it a supplementary order?

Mrs. Scrivener: Because it follows the first decision and, of course, apparently there was an oversight in terms of the submission of accounts. And so this was the order to pay accounts. I think that they have to use the word "order" in order to be able to requisition the cheque.

Mr. Bell: Is it intended to be supplementary to the first order in the full sense of that word?

Mrs. Scrivener: Yes. I would think that -- you see, in the first order, there should have been a notation as to costs. It was contained so this is an added starter.

Mr. Bell: All right. And --

Ms. Scrivener: And it is done under Section 22 of the Act.

Mr. Bell: And can you clarify for us or confirm for us that the amount that is stipulated therein was an order for the payment of expenses incurred solely referable to medical reports?

Mrs. Scrivener: Yes. These are all contained in the material that I would have placed before you yesterday, and if you will give me a moment I will read them off to you.

Mr. Bell: No, I do not want you to read them off, but as long as --

Ms. Scrivener: These would be hospital reports, medical reports.

Mr. Bell: Okay. And no component of this amount went to legal costs or fee for services rendered by a lawyer?

Mrs. Scrivener: Oh, I would think so. I am sure they would have paid something to the solicitor because we nearly always provide an honorarium to the solicitor. It is possible that they did not.

Mr. Bell: My understanding is, it went for the payment of six accounts -- medical, hospital or some combination. I think your counsel is indicating in the affirmative.

Mrs. Scrivener: It is unusual, as a rule, to make an honorarium to the solicitor for his time in presenting the case.

Mr. Bell: Well, I do not want to go back to the last case, but the last case also -- the supplementary order so-called did not provide for payment of any legal costs either. It was purely a matter of expenses incurred.

That is all the questions, Madam Chairman.

Ms. Scrivener: Madam Chairman, may I conclude my presentation? The questions started before I had really finished the things I wanted to say.

Madam Chairman: We will take Mr. Johnson's question and then by all means, please do.

Mr. Bell: Mr. Johnson?

Mr. Johnson: I am sorry. I am having a little trouble, and this could be either to you, Mrs. Scrivener, or to you,

Mr. Bell.

It seems to me that we are really getting caught up in the Dalton decision of 1982. The concern that I have is if this is so important to this piece of legislation, why did the Committee of the Legislature that amended this Act not make clarifications to Section 17 and 25 when it was amended in '87?

Mr. Bell: Mr. Johnson, I cannot answer that question. There may be somebody in the room that can if he had some particular involvement with the legislation when it was amended.

I would only speculate, and that speculation would be that the Attorney General, the Ministry, considered that the instructions given in the Dalton decision respecting Section 17 and how the Board should apply the principles in Dalton with respect to Section 17, were clear enough that a legislative amendment on that point was not needed.

And you heard yesterday from the Ombudsman's office, and I concur that the difficulty is not the language of Section 17 nor do I think the difficulty is the language of the Dalton decision. The difficulty is, How is Section 17 being applied by the Board in respect of the Dalton decision? And you know what the Ombudsman's view is, and you have heard from Mrs. Scrivener now that they consider that the Board is doing everything that the section and that the decision requires of it.

But my view is you do not need a legislative amendment to Section 17 to address the question of Dalton.

Mr. Johnson: Well, I have a great deal of difficulty because Section 17 reads very clearly to me that behaviour of the victim has to be one of the prime concerns.

Mr. Bell: There is no doubt about that, sir. There is is no doubt about that. I think the debate focuses now on what is the severity of the injury, the threshold test, so to speak, and that once severity of an injury is established, must the Board compensate?

Aside from 17(2), which is another particular discretion that would permit the Board even -- I would suggest even with a severity of an injury to deprive somebody of compensation. But absent any of the other factors, does severity make compensation mandatory to the Board in an amount that the Board considers to be appropriate, like a dollar?

Mr. Johnson: Well, hypothetical then in the severe case would likely be one involving death. So in the event that the case was to the ultimate seriousness, you disregard 17.

Mr. Bell: I do not think so, no. No.

Mr. Johnson: Well, it is debated about whether 17 is the more important are than the severity.

Mr. Bell: That is part of it, sir, and an excellent question of the chairman would be, Have you ever deprived anybody's dependence after a murder was committed on 17?

Mr. Johnson: Okay.

Madam Chairman: Mrs. Scrivener, if you would make your concluding remarks, please.

Mrs. Scrivener: Thank you. I have two comments, Madam Chairman.

In the first instance, considering the lengthy debate yesterday concerning Section 23 as it reads against Section 25 and that -- a little phrase "may vary an order for payment of compensation" and all the debate concerning the legal position of the Board in terms of Section 23, this morning I went into my file and I found some correspondence which has been received more recently as December 3rd, 1987, and it is an opinion which was given to us in connection with another matter but which contains these words:

"As a general rule when an administrative tribunal has dealt with a matter involving a particular individual and a particular situation, that tribunal is functus officio, i.e. the tribunal is considered to have dealt with the matter finally and has no jurisdiction to reconsider the merits of its decision or entertain a new application respecting the same situation. The principle applies to the Board as a matter of common law although it is arguable that it is also codified in Section 23 of the Act..." and so forth.

And then it goes on:

"The only exception to the functus officio principle is where a tribunal has reached a decision in a manner contrary to the rules of procedural fairness or natural justice or has failed to comply with statutory procedural requirements.

However, Section 25 of the Act does authorize the Board to reconsider decisions and vary awards in certain situations. And it goes on:

"The Board's power to review earlier decisions on the basis of new evidence or changed circumstances is specifically addressed in the legislation and is restricted to variation of orders for payment of

compensation. Any other reconsideration or variation is impliedly excluded as a result where the Board hears an application and declines to make an order for compensation. It has no jurisdiction to reconsider the decision later on even where new evidence becomes available or circumstances change."

So I just add one more piece of opinion for your consideration.

To conclude, Madam Chairman, I think that committee members appreciate that I, as chairman of the Criminal Injuries Compensation Board, have responsibility for the administration of that Board and for the administration of the Compensation for Victims of Crime Act.

The Ombudsman, through this application, the previous application, and another, has been pressing me to undertake an action which I consider to be illegal, an action for which I have no authority in law.

Having said that, it seems to me that this is a serious question of administrative law which has been raised, and if the Committee would like further guidance on it, I think that they have recourse to the Attorney General who is the chief law officer of the Crown for Ontario, and they could ask him for a definitive opinion and he would probably come back with something that is pretty weighty. But I think that perhaps this is something that you can settle by an application to the Attorney General quite properly. That is number one.

My second points are these: There are questions that have been raised in both of these applications. The question very simply is, Did the Board make a correct decision? And as these cases are being examined, you are also having the question arise, Is the Dalton case good law? Does it apply to these two cases before the Committee actually, and if so, is the Dalton case good law?

So the Committee does have access to solutions. Its first solution is the obvious one that you can reject and said "no." The second one is legislative. You can go make a recommendation to the Legislature for suitable legislation to correct these if in your opinion you think they need to be done.

The third one, and one that might be quite a wholesome one from the point of view of the Committee, is that with the consent of the Board that the Committee refer these matters to the Divisional Court for clarification. And that may be the solution that you would want -- the route that you would want to go.

I think you are all finding how difficult it is to be a

justice of the court or even to be a member of our Board. As I said to you yesterday in my early remarks, it helps to be Solomon, but we are not Solomon. We do our very best. We bring in decisions which we think are appropriate to the circumstance as they have been presented to us, and write the Board orders in that way.

I also said to you at that time that Board orders are changing and evolving and, I think, improving. I think it is entirely possible a Board order concerning this kind of a hearing would not be written in this way today, but this is the way it was written five years ago.

So I leave these remarks with you, Madam Chairman. I want to tell you that I have -- I cannot say it has been entirely enjoyable, but it has been a most interesting and stimulating experience to be here before you and to exchange with you and Mr. Bell and members of the committee.

I want to reiterate also the fact that we have been cooperative with the Ombudsman and hope that this will be something that we can continue in the future.

Thank you very much.

Madam Chairman: Thank you very much, Mrs. Scrivener.

Mr. Bell?

Mr. Bell: Ms. Scrivener, could I just explore the last point that you left with the Committee, the issue of the Divisional Court. Are you saying that the Board would co-operate in a solution to these two cases wherein the Divisional Court was asked to issue an order that would permit the Board to look at it again?

Mrs. Scrivener: Well, if the Divisional Court so ordered.

Mr. Bell: All right.

Mrs. Scrivener: I think that we need to get some greater clarification in terms of Dalton. I raised the question. I said, "Is Dalton good law? To what extent is the Board -- "

I have heard Mrs. Morrison saying that Dalton says the Board must do this. Dalton does not say any such thing. But she said "must," and you picked it up. I heard you use that word.

"Must" is a very big word to apply on the basis of the decision of a court on one case, but I think the principle that arises from Dalton is a very important one, and certainly Dalton has broadened certainly the attitudes of

our Board right across the way in terms of how they approach all cases of very severe injury.

But having said all of that, I do not regard it as a must. It is a very serious relevant circumstance to consider but it is not the only circumstance.

Therefore, to answer your question, I think the Divisional Court should be appealed. If you decide that this is what you want to do, then I think you can put it to the Divisional Court and see what they can do with it. I think a definition, a clarification of the importance of the Dalton case is in order.

Mr. Bell: Okay. Thank you.

Madam Chairman: Any further questions from the Committee? None? I think we would like to go in camera and have a discussion about this -- Oh, I am sorry. My error. Ms. Morrison, please.

Ms. Morrison: First of all, can I ask Michael Zacks, General Counsel at our office, to make a comment on one aspect of the matter that was raised by the Board? It is just very short, I promise.

Mr. Zacks: Nothing what I mentioned yesterday.

Madam Chairman: Because the committee is already toying with the legal and jurisdictional problem.

Ms. Morrison: Yes; this is not to do with that.

Mr. Zacks: This has nothing to do with that. It is just that this is the first time in my recollection of this Committee that you have been asked to draw inferences adverse to the complainant because that complainant chose to come to the Ombudsman's office instead of pursuing some other remedy that was legally available to him or her.

I think drawing that type of inference goes really to the very essence of what the Ombudsman does, and if people who choose to come to our office, which they have the statutory right to do, are put in the position of some adverse effect being drawn, having being drawn by indeed the Ombudsman and this Committee because they make that choice as to the merits of their complaint, that really undermines, I think, the very role of the Ombudsman's Office.

I would just like to draw your attention to the last section in the Ombudsman Act, Section 29, part of which reads: "The provisions of this Act," the Ombudsman Act "are in addition to the provisions of any other Act or rule of law under which any remedy or right of appeal or objection is provided for any person."

So my submission to you is that you ought not to draw any adverse inferences because these complainants chose, as is their statutory and legal right, to come to the Ombudsman against their position and your deliberations.

Mrs. Scrivener: But I, in response, did raise to the committee yesterday the whole matter of Section 15(4) as you did, Madam Chairman, so the Ombudsman is at least bound by that matter of an appeal.

Madam Chairman: Thank you. Ms. Morrison?

Ms. Morrison: Yes. I will be very quick. I think everyone has heard all they need to hear about this particular case. I will just note because of Mr. Johnson's questions that we are not at all suggesting that this man's behaviour should not have been taken into account.

I think Section 17 does give the Board, if it finds the appropriate facts, the power to take someone's behavior into account in reducing their award. I think we are talking here about very serious injuries, and we are talking about the fact that the Board is required, and, in fact, I think the word "must" is appropriate from the Dalton case to take into account the severity of the injuries.

The Board says it does not need to follow the Dalton case, and, of course, the effect of that would be if they did not follow it that perhaps nothing would happen, because many of the people who go to the Board could not afford the appeal that would be necessary to change a decision which does not follow that case. I do not think that this committee would recommend that the Board not pay attention to the Dalton case as "good law."

I also note that we have come up against a very difficult legal problem at the very end of our process here which is very unfortunate. I think the process in the Ombudsman's office is to provide information to the Board or to the governmental organization all the way along the investigative route. Our 19(3) letter went to the Board in August, I believe, and the response from the Board in September did not raise this difficult legal problem. Perhaps we would have had weightier legal opinions to deal with had we had earlier notice that that was a serious problem for the Board.

In summary, I would like to thank the members for their serious consideration of both of these cases which I believe are very difficult cases, and I think you have given them your very serious consideration and asked very good questions, and I would ask that you now consider our recommendations just as seriously.

Thank you.

Madam Chairman: Mr. McLean?

Mr. McLean: I have not heard it yet. Was the offender charged?

Ms. Morrison: Yes, and convicted.

Mr. McLean: And convicted?

Ms. Morrison: Yes.

Mr. McLean: Of?

Ms. Morrison: Assault.

Mr. McLean: Assault. Thank you.

Mr. Lupusella: Final question --

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: Taking into consideration the severity of the injury, do you not think that if this process is going to be used as a test, the content of clause 17(1) is going to diminish the effectiveness of -- Section 17(1) is going to diminish?

Ms. Morrison: I think it depends on whether you felt 17(1) was there so that you could deny people compensation, If that is not what it was intended to do, it will be effective to reduce compensation where it is sensible to reduce it. I do not think that its effectiveness would be reduced at all. I think, in fact, it would be used more effectively under the circumstances.

Mr. Lupusella: Thank you.

Madam Chairman: Any further questions? Then we would like to go in camera and we hope to deal with this as expeditiously and judiciously as possible.

Thank you.

11:25 a.m.

After other business:

12:26 p.m.

Madam Chairman: Thank you very much for waiting so patiently. The Committee has come to its decision on both cases, Ms. D and Mr. B.

With regard to Ms. D, which is the case that we heard yesterday, the Committee has come to the following decisions.

With regard to Ms. D, the Committee supports in principle recommendation number 1 in the Ombudsman's section 22(3) report that the Criminal Injuries Compensation Board award appropriate compensation to Ms. D for loss of income and pain and suffering as a result of the injuries sustained as well as additional costs including return bus fare to Alberta from the hearing in Toronto as well as reasonable babysitting costs to allow Ms. D to attend the hearing in Toronto.

The Committee has not accepted recommendation number 2 of the Ombudsman in his Section 22(3) that the Board establish guidelines to assist Board members in applying Section 17(1), but the Board will be commenting on this in its report with regard to the Dalton case and how Section 17(1) should be applied or could be applied by the Board.

The committee has decided not to accept or support recommendation number 3 of the Ombudsman in his Section 22(3) report but will be making comments about this in its report. It notes that the Board is very sensitive to battered spouses in its deliberations, and we express our concern about battered spouses and our concern for this issue in our society and we will be dealing with this issue in our report.

The Board has decided to accept recommendation number 4 of the Ombudsman's Section 22(3) report that the Board provide full written reasons to applicants for all decisions made under the Compensation for Victims of Crime Act.

The Committee has supported that recommendation number 4 -- Sorry. The Committee has supported recommendation number 4 that the Board provide full reasons.

With regard to the case of Mr. B, the Committee has decided to support in principle the Ombudsman's recommendation number 1 in the Section 22(3) report noted on page 9 of that report that the Criminal Injuries Compensation Board award appropriate compensation to Mr. B for loss of income and pain and suffering as a result of the injuries sustained by him.

With regard to recommendation number 2 of the Ombudsman's report outlined, while the Committee does not support that recommendation, it will again be making its comments with respect to 17(1) in its next report.

The Committee also supports recommendation number 3 of the Ombudsman's report that the Board provides full written reasons to applicants for all decisions made under the

Compensation for Victims of Crime Act.

The Committee will also be making a recommendation to the Attorney General that Section 25(1) of the Compensation for Victims of Crime Act, RSO 1980, Chapter 82, Section 25 be amended by deleting the words "for payment of compensation."

The Committee is not in a position at this time but will be doing so when it does its report, make recommendations and provide ways in which recommendation number 1 of both Mr. B and Ms. D will be implemented. We feel that a number of jurisdictional questions were raised and we would like to provide a method by which this can be resolved.

The Committee will be reporting these decisions in its next report and it will advise to the Legislature that they be immediately dealt with.

Any further comments? Yes, Ms. Morrison?

Ms. Morrison: Madam Chairman, I would like to raise a matter if we are finished with the merits of these two case, which I feel should be addressed to the committee and perhaps we can get your guidance on it in relation to a situation that arose with these reports. It does not go to the merits of case and I felt it was unfair to raise it earlier.

But these reports were presented in anonymized fashion to the House and subsequently a break in that anonymity occurred and our complaintant's names were splashed all over the front pages of the newspapers. One of our complainants who came to us had very much relied on our assurances that our investigation was confidential, that our report to the committee was is in confidence, and that we would preserve anonymity in respect of the name.

I think we would like to say on the record that we are very concerned about this because, particularly in an area like victims of crime, there may be very strong reasons why a person does not want his or her name associated with a particular decision that is being made. I think that it would prevent people from coming to us with this kind of complaint if they felt that subsequently they would be the subjects of publicity about a matter which has happened sometime in the past.

I think we would like the Committee's guidance with respect to how this might be prevented or some comment on what could be done about this problem.

Madam Chairman: Mr. Bell?

Mr. Bell: Ms. Morrison, are you asking the Committee to

consider that in its next report to deal with the issue of confidentiality in the entire process including the committee's deliberations as it has done from time to time in the past?

Ms. Morrison: I think that would be appropriate. I think we need some thinking about how this might be prevented in the future. We cannot take the words back now.

Mr. Bell: Would you agree that - and I do not think it serves anything to get into the reasons at this time - that perhaps if there was a more complete knowledge and understanding of the process by all concerned that it might prevent situations like this in the future?

Ms. Morrison: I think it might.

Mr. Bell: Okay. You agree with me that is a two-way street in many respects and specifically that perhaps your office should wear belts and suspenders both when dealing with governmental organizations to ensure that what you might think is the obvious, be known?

Ms. Morrison: I agree we should do as much as we can. I think we are at a disadvantage when we do not know whether people are aware of the provisions of the Act. I think we should do more to publicize that, that these are --

Mr. Bell: Maybe an added paragraph in the 22(3) report, boilerplate as it might be, might be an answer?

Ms. Morrison: Our experience with boilerplate paragraphs has not been very good but we might try it.

Mr. Bell: Okay.

Madam Chairman: Mr. Elliot, just one comment?

Mr. Elliot: I think there are two times when this kind of error could be stopped in future, and I would submit that, subject to the approval of the Committee, that some sort of an information sheet should definitely go from the Ombudsman's office to everyone presenting to this particular committee. And as a backup to that, once we draft our things here, the Clerk of the Committee could duplicate that effort, because I think the more you do to stop this break in confidentiality, the better it would be, and I think that that should be a definite recommendation of this committee.

Ms. Morrison: I think that at the time it is actually coming to the Committee we would suggest that it would be the committee's responsibility to deal with that.

The problem that I see is often the release of a 22(3) report is not connected in any way with coming to this

Committee. It happened to be in this case because these were special reports, but quite often it is in the context of our annual report that the report is released and it is not just going to come up before a committee. It seems to me that there is a very great danger at that stage of a break in confidentiality which we do not see how to prevent and certainly that the Committee could not prevent.

Mr. Elliot: A supplementary, if I may. My understanding is there is constant dialogue between your office and groups that might come before this Committee and there has got to be a certain point towards the Committee hearing stage when there is a very good likelihood of it coming to this Committee.

If at that point it was raised that anything raised in the Committee has to be confidential, I think this would just be a natural courtesy from your office to the Board or commission or whatever it was that was coming before us. Because I think you are expecting them because we have had two new groups come before us already, and they probably felt like I did the first day of the Committee hearings. We did not really know a lot of the detail.

I think, as I said before, it would be much better to overemphasize that information in getting to the people at the appropriate time than not to have them get it as happened in this particular case.

Madam Chairman: Mrs. Scrivener?

Mrs. Scrivener: Madam Chairman, in speaking as a new person before the Committee, I have to concur with these remarks but I have you to say it would be helpful if the Clerk of your committee could provide all persons who are appearing before you with the briefing material that has been presented so that one at least has some idea of what has been circulated, because I did not know, and it was not until I asked as a question, because I was preparing material to bring to you and I was wondering what you had.

Madam Chairman: Mrs. Scrivener, did you not receive any material from the Clerk?

Mrs. Scrivener: Nothing, no nothing. Oh, we asked and arranged to get it but it was never volunteered.

Madam Chairman: When did you receive it?

Mrs. Scrivener: Thursday or Friday of last week.

Madam Chairman: We only received our material a few days in advance of that, as well. So, in fact --

Mrs. Scrivener: But I am saying I would have thought it

would be very helpful if we could have that sort of thing circulated to us in advance so that we would have some idea.

Madam Chairman: We will make a notation of that to the Clerk, but, in fact, my understanding is that you were provided with the material and maybe the lateness is something that we will have to deal with.

Mr. Philip?

Mr. Philip: I guess I just do not understnad the complaint because there was nothing that we would have been presented with that you would have not had in your file as a result of your interaction with the Ombudsman's office.

Mrs. Scrivener: But, I, as I say, was preparing material to bring to this Committee, and I had at that point in time no idea if you know anything about our Board or had been provided even with so much as our Act. And I asked my assistant to telephone the Clerk's office to ask if you had any briefing material, and she said, "Yes" or he said, "Yes," and then we arranged to get a copy of this because we did not know what you had. But it was never volunteered to us, not at any point in time.

Madam Chairman: Mr. Carrothers?

Mr. Carrothers: Yes. I just wanted to pick up a bit on one thing that was said and ask or suggest, perhaps -- it is my feeling from looking at what we get that the materials and correspondence that the Ombudsman's office has with the various agencies is not anonymized when it is having that correspondence; it is then anonymized before it comes to us.

I am wondering if you might consider somewhere earlier in your process even anonymizing your correspondence with the department. That would, I think, indicate to them that anonymity is important, because it seems that where the problem occurred here was not as it came to the Committee but perhaps when it was not understood that the thing was dealt with an an anonymous basis prior to it coming here.

Ms. Morrison: A couple of points. In order to get the information we need from the Ministry they have to know who we are talking about. So all the way through the process --

Mr. Carrothers: But you might say, "From now on we will call him Mr. So-and-so and Ms. So-and-so."

Ms. Morrison: Right. I think that is a possibility.

Mr. Carrothers: Just consider that because that seems to be where this systems broke down.

Ms. Morrison: I should stress that the real problem that arose here was not with the materials coming to the Committee. The real problem arose the day the report was tabled, and that seems to me a much harder problem to prevent because counsel is very careful about what he allows to be put before the Committee members, and I have seen a number of times where the stuff is anonymized just before you get it. But the problem of the report being released and then suddenly getting into the press is a very serious one.

Mr. Carrothers: I guess the point I am making is it seems to me that what may have happened here it is before it comes to the Committee. It is the fact that before it becomes a hearing or recommendation denied that comes to a hearing, it is not dealt with by your office on an anonymous basis then all of a sudden the shift occurs. If the agency in question is not perhaps used to that shift occurring, they may not be aware of it.

I am just suggesting that if it could be alerted or even as you get into the 19(3) point, maybe you could say, 'Well, for our purposes and further discussion, these are now who these people are. It is anonymized from now on.'

If I were receiving that correspondence, I might not exactly be aware that when it came here it was anonymous. That is the point I am making.

Ms. Morrison: I understand.

Madam Chairman: And the other point perhaps is that in future if the Ombudsman's office could inform the other party that we are being provided with material, that if any new material is to be submitted before the Committee, that it should go through you first and be approved such and ensure that it is anonymized, because we have had some material come forward all week and I think that unless it has been discussed between the parties before, I do not think it is appropriate that we get material submitted to us while the presentations are going on.

Anyway, I think your comments are appropriate and I think we will be discussing them, the confidentiality, and we note your concern and our concerns, and I think we should work together with the Ombudsman director on how to best facilitate rectifying this problem.

Ms. Morrison: Thank you.

Madam Chairman: The Committee will adjourn now until 2 o'clock, and we will resume at that time with the Ministry of Natural Resources.

Thank you.

The Committee adjourned at 12:43 p.m.

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XC 108
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STANDING COMMITTEE ON THE OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1986-87
THURSDAY, JANUARY 28, 1988
Afternoon Sitting



STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Elliot, R. Walter (Halton North L)
Bossy, Maurice L. (Chatham-Kent L)
Carrothers, Douglas A. (Oakville South L)
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Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
McLean, Allan K. (Simcoe East PC)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:

Johnson, Jack (Wellington PC) for Mr. Pollock
Morin, Gilles E. (Carleton East L) for Mr. MacDonald

Clerk: Decker, Todd

Clerk pro tem: Manikel, Tannis

Staff:

Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:

Hill, Dr. Daniel G., Ombudsman
Morrison, Gail, Director, Investigations
Meslin, Eleanor, Executive Director

From the Ministry of Natural Resources:

Robinson, Ronald, Solicitor, Legal Services Branch
Winterton, Guy, Regional Biologist, Northwestern Region

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON THE OMBUDSMAN

Thursday, January 28, 1988

The committee met at 2:08 in committee room 2.

Madam Chairman: I think we are ready to resume. We will need somebody on the Ombudsman's side of the table when you are ready. Thank you, Dr. Hill.

We are dealing with the case in Tab X, Y, Z and it is Chief B and the Ministry of Natural Resources.

Dr. Hill, if you have a few opening remarks.

Dr. Hill: Yes, Madam Chairperson. Thank you.

This case concerns a number of commercial fishermen who are members of an Indian Band. Their complaint against the Ministry of Natural Resources was made by the chief of the Band.

The Ministry had agreed at a meeting with the Band that one person could act as fishery manager and submit the fishing reports, which are required by law, on behalf of a number of the fishermen. In making this agreement, the Ministry knew that legally each individual fisherman would remain responsible for submitting the reports. Later, when several reports were not submitted, Ministry official mentioned this fact to the chief in telephone conversations.

I would point out that these conversations resulted from calls placed by the chief to the Ministry and were for the purpose of discussing fishing quotas, not reports. The Ministry took little by way of initiative or steps to inform the individual fishermen their reports were delinquent, and yet Ministry officials would have been aware of that, due to the agreement. The individual fishermen could well have been unaware the reports had not be filed.

Ministry officials did nothing to warn the individuals either of the fact that reports had not been filed or of the consequences of failure to file. The Ministry then proceeded to lay charges against the individual fishermen under the Game and Fish Act. Following the laying of these charges, these fishermen were convicted and fined.

In my opinion, Madam Chairperson, the Ministry's decision to lay the charges was unfair in the absence of notification that reports had not been filed and in the absence of warnings that charges could result.

I ask for your support of my recommendations to undue

the effect of this unfairness and prevent its recurrence.

Ms. Morrison will be presenting the case for the Ombudsman's office.

Madam Chairman: Thank you very much, Dr. Hill.

Ms. Morrison: Here I am again. I think you are tired from hearing from me. I will try and be very brief this afternoon because I do not think this is very complex.

Madam Chairman: Thank you.

Ms. Morrison: Dr. Hill has set out the sense of the case. It is a case about fishermen who were to report to the government, by law, about their catch.

The Ministry made an arrangement with the fishermen so that one of the people who fished with them could make reports on everyone's behalf. This person failed to make the reports. In the end, the individual fishermen, who were still legally liable, were charged and convicted for not filing the reports.

Our argument is not about the charges and the convictions. We are not suggesting that once charged the convictions were unjust. They had not filed the reports and, under the Act in question, a conviction could follow.

Our point is much simpler. Our point is that the Ministry, having made an arrangement with these people, then went back on that arrangement by charging them without giving them warning that the arrangement was not working.

We do not think that we need to consider very seriously the only very serious objection that the Ministry has made to our recommendation. I will get to the documentation later, but in the response to our Section 22(3) report, the Ministry's main point was that if you upheld our recommendation the administration of justice would be brought into disrepute.

We believe that the actions of the Ministry in charging these people when they had an agreement with them about how the reports were to be filed, and when they did not warn them that the reports were not being filed, was unjust and their discretionary decision to lay the charges was thus unjust.

Before we get too far, I would like you to have a quick look through the legislation which I had passed out just this afternoon. Did that get passed around?

Mr. Bell: The regulations?

Ms. Morrison: You have Regulation 414 and attached to that you should have the Game and Fish Act.

If you look at Section 85 of the Game and Fish Act, which is a couple of pages in, you will see "A contravention of this Act..." Section 85:

"A contravention of this Act or the regulations or of the terms and conditions of a license is an offence against this Act."

You will see at Section 12, which is in the second page of the materials you received, Section 12:

"An officer shall investigate all contraventions of this Act and the regulations brought to his notice and may prosecute any person who he has reasonable cause to believe is guilty of an offence against this Act."

The section suggests that there is some discretion in bringing prosecution for a contravention under the Act.

I would like now to take you through the materials very briefly. The first few pages of the synopsis I am going to leave for the moment. That would give you a good summary if you need to refer to it, but I would like to go quickly through some of the other materials at this time.

Page four, you can see that this complaint was brought to us by, what is labeled in your materials, the Band. This is a Band that is acting on behalf of the native people. These are native fishermen who have been fishing in these areas for a number of years and have had a long standing connection with this particular area and long standing rights to fish from this particular lake.

They forwarded the complaint to us and our usual process was followed. At page 7, you will see that we informed the Deputy Minister of our intention to investigate. This letter differs from our usual "intent to investigate" letter in one aspect. At the bottom of the page 7 you can see that we ask the Ministry to consider a particular point.

"Although the substance of the charges laid will not form part of our investigation, it would be much appreciated if there is anything your Ministry could do to postpone legal proceedings until we have had an opportunity to complete our investigation."

Mr. Bell: Why did you make that request?

Ms. Morrison: We made that request because the Band had come to us with the complaint when charges had already been laid. We felt that the substance of the Band's complaint,

if true, suggested that the Ministry might have been unreasonable in exercising its discretion to lay the charges.

We felt if we could keep the charges from being heard, then if in fact our investigation showed the Ministry had been unreasonable, it would be much easier to undue the damages.

Mr. McLean: What if the judge would have found them not guilty?

Ms. Morrison: I think if the judge had found them not guilty, that would have been another way out. But in terms of our investigation, we wanted to be sure that they did not have to take that chance if the Ministry had been unreasonable in laying the charges the first place.

The issues before the court would not include that. The court could only decide whether -- it is a bit similar to have a parking ticket. If the judge found that, in fact, they did not do the things they were supposed to do under the regulation, he would have to find them guilty, and he would not be looking at the same issues that our investigation would look into.

Madam Chairman: Mr. Bell?

Mr. Bell: Let's play it out. Postpone the legal proceedings because it is possible I may ultimately conclude that the proceedings should not have been initiated and I may recommend that the proceedings not be proceeded with, if you forgive that grammar, all right?

Ms. Morrison: That is right.

Mr. Bell: I guess I might as well be blunt...

Ms. Morrison: Sorry, I did not hear.

Mr. Bell: How do you think you can make such a recommendation?

Ms. Morrison: That the charges not be proceeded with?

Mr. Bell: Yes. Does that not interfere with the process, the criminal justice system?

Ms. Morrison: Well, I do not think it does. I do not think the criminal justice system is interfered with if the reason for laying the charges in first place was a wrong one.

There is a discretion in the Ministry to lay the charges, there is the discretion for them to drop the

charges. In fact, if you go further in our materials, as I will show you later on, the Ministry offered a deal on these charges later. So clearly they did not feel there was any problem with that.

Mr. Bell: Where is the discretion to withdraw them?

Ms. Morrison: Well, let me just say if there is no discretion to withdraw the charges, then the Ministry in offering a deal of the charges later on in the investigation was doing something that it ought not to have done.

In these charges, my understanding is that there are often cases in which the Ministry settles for one charge in place of ten or exercises its discretion not to proceed with the charges for some reasons.

Mr. Bell: If there is any discretion to withdraw charges, is it not from the crown?

Ms. Morrison: The Ministry certainly could recommend to the crown that the charges be withdrawn, as often happens in the case where, for example, members of the police do not show up at a particular criminal action. The charges are withdrawn by the crown because they do not think they can proceed with them. That could have been done here.

Mr. Bell: I note the letter at page 7 is not a letter that is signed by the Ombudsman.

Ms. Morrison: No. Our Section 19 letters are not necessarily signed by the Ombudsman. That power to notify is delegated to various people in the office.

Mr. Bell: Was he consulted before the letter was written and the request was included to postpone the pleadings?

Ms. Morrison: The Ombudsman?

Mr. Bell: Yes.

Ms. Morrison: I believe so.

Mr. Bell: That is all I have.

Ms. Morrison: The Ministry's response is on page 9. The Ministry suggested that this would be an interference in the judicial process in postponing the matter. I can only suggest that the usual seeking of an adjournment is not considered interference in the judicial process.

While further down the line the Ministry might have had to make difficult decisions in recommending to the crown that the charges be withdrawn, at this point the

postponement of the charges would not have been interfered with the judicial process, in my opinion.

There were discussions that went on in the investigation and a completion of the investigation to the point of the Section 19(3) letter which is on page 10 to 15.

There are a couple of points of fact that I would draw to your attention in the report. The first is the information that was going back and forth between the Ministry and the Band. Our investigation has shown that the agreement was made with the Band in April of 1985, that a fishery manager would submit the forms on behalf of all members of the Band.

Just for clarification, I am going to pass around -- it is difficult to xerox because of its size. I am going to pass around a sample form. You can just have a look at it and pass it on. It may give you some idea why sometimes there were difficulties in filling these forms out properly.

The fish manager of this particular Band was to fill the reports out on behalf of everyone and submit them to the Ministry. The first fishery manager that was appointed to do this, a Mr. A, quit not long after this agreement was made and another fishery manager was appointed.

By August, neither of the nil reports for the months of June and July had been submitted. Our information is that the chief of the Band, whom we call Chief B, called the Ministry to ask about quote at one point in August of 1985. He did that because he wanted to make sure that the Band's quota had not been filled.

In that phone call, one of the Ministry people that he was talking to apparently mentioned to the chief that returns for June and July were overdue. Again, on September the 9th the chief spoke to a Ministry official and was again reminded that these returns were overdue.

I should stress that the chief was not the person who had been appointed as the person to fill in the returns for the fishermen, that was the fishery manager. As far as we could tell, there was no attempt to contact the fishery manager. If there was an attempt to contact the fishery manager, there was no documentation that we could find that would confirm that.

In early October, the new fishery manager, now taken over by a person called Mr. W, travelled to the MNR office in Kenora to submit the fishing returns for September. There was a problem with the form, one of the columns was incorrectly filled in, and one of the MNR staff assisted Mr. W in telling him how it should be filled out.

Unfortunately, he did not have all the information he needed to fill them out on the spot, so he took them back with him to the reserve. While he was in the office at that time, he learned that the June, July and August reports were not submitted. He was not, however, given a deadline for their submission. That was early in October and late in October, early November, the charges were laid. Summonses were delivered to the twelve licensees in the first week of November.

The people charged had no way of knowing that the returns had not been submitted since it was their understanding that the returns were to be submitted by the fishery manager.

It was our view that the Ministry ought to have taken more trouble to get in touch with the individual members who were to be charged and let them know that their returns were not filed. Even if they were not willing to get in touch with individual members, perhaps instead of talking to the chief when he called on occasion, they ought to have gotten in touch with the fishery manager to see whether he was going to submit the returns as requested.

The Ministry has said that it was not their practise since 1982 to send individual notices to fishermen who had not filed returns. We found, however, in our investigation, and you will see this at page 14 of your materials, that as late as January 4th, 1985, letters had been sent to fishermen advising about overdue returns. It was our view that it would not have been troublesome to do that in this case, especially as the numbers were not large.

The Ministry suggests that there are 2000 commercial fishermen and that it would be very difficult for them to notify them on a regular basis. It is our view that it is very unlikely that all 2000 have not filed their returns at any given time. And if 10 per cent of them had not filed their returns at any given time, say, 200 letters in a month is not a very large job for a Ministry.

In the end, in view of the fact that the individual fishermen were not advised directly about the reports and the possible penalties, the Ombudsman tentatively concluded that the Ministry had been unreasonable and that the charges should be dropped against the licensees.

In response to that, we received a letter at page 16 from the Deputy Minister. Essentially, the Ministry stated that the licensees were long time fishermen fully aware of the reporting requirements.

We suggest that they may have been fully aware of the reporting requirements; that was not the point. The point was that the reporting requirements had been changed for

these people by the agreement. They thought that some single person was making the returns for all of them and they had no way of knowing that those returns had not been received.

It is clear that they had not been told that they would not have some legal liability in this. We do not know the exact terms of the conversation in which the agreement was set up. But it is also clear that the Band expected that all of the returns would be made through the fishery manager.

The Ministry says at page 16 that it had made repeated attempts to obtain the reports in question. As I say, we do not have documentation to support that. They suggest that they had spoken on the telephone to the chief. You will note in the fourth paragraph the arrangement that the Ministry attempted to make at this time about the charges. The crown attorney offered to proceed on only one charge per license, accept a reduced penalty and withdrawn the remaining charges.

The fishermen involved refused because they felt on principle the laying of the charges in the first place had been unreasonable and to proceed with only half the charges would only be half unreasonable, but nevertheless unreasonable.

Again, at the bottom of the page, page 16:

"However, failing repeated attempts to obtain the information, and with a view to treating all fishermen equally, I feel there comes a time when charges must be laid."

The most recent information from the Ministry that I have also handed out today suggests that the Deputy herself approved the laying of the charges.

Page 18, on July 23, we sent another letter to the Ministry and this again is an unusual step in our investigation. The usual documentation you would see at this time is a final report. But at this time we had learned that the charges had been heard and that the three licensees had been convicted and fined, so the possible recommendation that we had suggested did not seem sensible any longer.

We therefore sent the Ministry, in accordance with Section 19(3), a new possible recommendation; a recommendation that the costs of legal expenses and the fines should be reimbursed to these fishermen.

Mr. Bell: Just stopping you there. The total amount of the fines was three times \$25?

Ms. Morrison: The information we had at that time was \$25 each. I believe there may have some subsequent fines of \$100 each.

Mr. Bell: But not with respect to those Band members?

Ms. Morrison: Not with respect to these Band members, I am advised.

Mr. Bell: So the monetary part of your recommendations is \$75?

Ms. Morrison: Plus a few legal expenses.

Mr. Bell: Do you know what they are?

Ms. Morrison: They did not have them at the time, but they could have obtained them if we wished to implement the recommendation.

The main view of the Band, with respect to this recommendation, is the three times \$25 was not the point. The point was the principle, that they had an agreement with the Ministry and that the charges should not have been laid given that agreement.

Again, our response to the Ministry at page 20 to our new recommendation, paragraph 3:

"All of the individuals involved in this matter have been involved with commercial fishermen for a number of years and were fully aware of the requirement to complete and submit the necessary returns."

The problem we have with that is that all of the individuals involved in this matter felt that the returns were to be submitted by the fishery manager and, therefore, did not submit the returns themselves.

We then went on to finalize the report, the Section 22 report which appears at page 23 of your materials, and we received a further response at page 31.

Mr. Bell: Sorry?

Ms. Morrison: I am at page 31, the Ministry's response to our final report.

In that report, the Ministry pointed out its perspective in the matter, pointed out the necessity for managing fishery resources and the important aims of conservation. It pointed out that it was unreasonable for an individual to obtain benefit of a fishery without assuming responsibilities and, in general, touched on the concerns of

the Ministry with respect to the management of the fishing resources.

We are in agreement with many of the aims that the Ministry sets out in that response. We believe that there is a responsibility to manage the fishery resources and we agree with the Ministry that they have a difficult task in doing this.

We do, however, feel that in pursuing the aims, which we agree with, the Ministry must be fair and we think that there are other fairer ways of pursuing these aims than making agreements with the people that you are trying to assist and then in the face of that agreement charging them without warning.

Madam Chairman: Mr. Bell?

Mr. Bell: The recommendation that deals with the reimbursement of the fines and the payment of legal expenses, how is that any different than you recommending to a governmental organization that notwithstanding there had been a judgment at trial upheld by the Court of Appeal for the payment of a money damage by your complainant to the governmental organization, that the governmental organization reimburse the person for that amount?

Ms. Morrison: If that recommendation was based on some action of the government which occurred which was not within the frame work that the court would have looking at in judging the action, but was in fact something which the governmental organization did which was unreasonable which led to the action being brought in the first place when it ought not to have been brought, I do not think there would be anything wrong with that recommendation.

Mr. Bell: But you are saying in substance, reverse, at least in part, the decision of the court as upheld by the Court of Appeal?

Ms. Morrison: No, it doesn't reverse the decision of the court. The decision of the court had nothing to do with the discretion of the Ministry to prosecute.

Mr. Bell: The decision of the court in part is a fine?

Ms. Morrison: The decision of the court is a question of whether the fishermen, in fact, filed the appropriate returns; if they did not file the returns, that is an offence under the Act and a conviction follows.

Mr. Bell: But you are saying the conviction is wrong?

Ms. Morrison: No, I am not saying the conviction is wrong. I am saying that the Ministry was wrong to bring the

charges which resulted in the conviction in just the same way as it might be wrong for someone, for example, to say to you when you pull your car up in the front of the legislature: Do not worry, I will not have it towed away, and as soon as you go in they call the tow truck.

Do not worry, we will not charge you under this statute, we will allow an agreement whereby one of you can file the returns for all of you, even though you are all individually legally liable. Do not worry about it, we will not charge you. The decision to charge is then unreasonable. Once charged, then the court decision is a separate decision. The court decision is a decision it must make in accordance with the law.

Mr. Bell: But if that happens I have got my remedy. My remedy is take the oath upon the trial of that conviction and explain the circumstances of the assurance or the agreement, as the case may be, and invite the court, as the court must do, to that take that into consideration.

Ms. Morrison: The court might very well take that into consideration but say, as would be available to a judge to say, that the section of the Act is so clear it says if you do not file a return, you have committed an offence against the Act. It does not say there are any excuses like agreements and therefore I must convict you.

Mr. Bell: We do not need to conduct a seminar on what the discretion of the court is on the disposition of quasi criminal matters.

Mr. Morrison: No, I do not think we do.

Mr. Bell: But they dismiss charges all the time for reasons which do not go to the merits. And I do not know whether you know this, was the special arrangement raised at any of these trials or on appeal?

Ms. Morrison: I have not the answer to that, but I expect it was.

Mr. Bell: Would it affect or should it affect the Ombudsman's opinion if in fact the Appellate Court had specifically considered the special arrangement and rejected it?

Ms. Morrison: No.

Mr. Bell: Okay. Do you have a copy of the Ombudsman Act handy?

Mr. Morin: Yes.

Mr. Bell: No, Ms. Morrison.

Ms. Morrison: I am advised, Mr. Bell, in answer to your question a moment ago about the issue on appeals, the issue on appeal was whether the charges were brought in the proper jurisdiction, they were not a question that related to this.

Mr. Bell: It was not an appeal on the merits, it was on a legal point?

Ms. Morrison: Yes, that's right.

Mr. Bell: You still do not know whether it was raised at the trial of first instance?

Ms. Morrison: We do not know what the issue was, but certainly the main point at the trial of first instance was: Did you file returns? No, we did not file returns.

Mr. Bell: But they were represented by legal counsel?

Ms. Morrison: Yes, they were.

Mr. Bell: Would you turn to Section 15(4)B of the Ombudsman Act or A for that matter, but particularly B.

To move it along, I will assume you are of the opinion that 15(4), either A or B, has no application to this case because we have got a recommendation --

Ms. Morrison: That is right.

Mr. Bell: -- and a report? Can you tell us, though, firstly, did the Ombudsman ever consider whether his jurisdiction was ousted under 15(4) A or B?

Ms. Morrison: Yes, we did.

Mr. Bell: Can you tell us what your conclusions were and why?

Ms. Morrison: Excuse me for a moment, please. This is my colleague Andrew MacDonald who reviewed this matter. If you give me a minute I will see if I can find the memo.

Mr. Bell: If it is any more than three pages, I do not want to see it.

Mr. MacDonald: I do not think it is.

We were focusing on the issue of the reasonableness of the actions of the Ministry as distinct from the merits of whether or not they were guilty under the legislation. So we viewed that our jurisdiction is wider on the issue that was before the courts and those were the issues that we were focusing on. So that refers to Section 15(4)A.

Mr. Bell: While Ms. Morrison is thumbing through, can we agree, though, that the decision to lay the charges in this case was the decision of the crown?

Mr. MacDonald: That was not our information. I believe the decision was made by the Ministry officials.

Mr. Bell: All right. If that is your position then maybe we will have to hear from them.

I thought the process was a recommendation from the Ministry to an officer of the crown and therefore subsequently charges are laid, and just as Mr. Robinson is really not an official of the Ministry of Natural Resources, he is an officer of the crown.

Ms. Morrison: Right. But I think our position, Mr. Bell, would be that the recommendation to have the crown lay the charges is a decision that is separate within the meaning of our Act, in any case.

Mr. MacDonald: Under Section 15(4)B, it says we have no jurisdiction with respect to a decision of any person acting as a legal advisor to the crown or acting as counsel to the crown in relation to any proceedings.

Our understanding was the situation in which these charges were laid was not a decision of a person acting as a legal advisor to the crown or acting as counsel to the crown in relation to any proceedings.

Mr. Bell: Let's take the fait accompli. Charges were laid; correct?

Ms. Morrison: That is right.

Mr. Bell: Your possible recommendation in your 19(3) was that the charges be dropped?

Ms. Morrison: That is right.

Mr. Bell: We agree those charges would be dropped only pursuant to a decision of an officer of the crown?

Ms. Morrison: The charges could be dropped if the Ministry recommended to the crown that they be dropped.

Mr. Bell: Not if the crown did not want to drop them.

Ms. Morrison: Well, the Ministry could have tried it though.

Mr. Bell: Your recommendation is that the charges be dropped, the tentative recommendation?

Ms. Morrison: That is right.

Mr. Bell: Does that fly directly in the face of 15(4)B?

Ms. Morrison: Perhaps our wording could have been that the Ministry attempt to get the crown to drop the charges. I think that is very technical.

Mr. Bell: Let's take it as it is read and written and intended. Does that not fly right in the face of 15(4)B?

Ms. Morrison: No, we cannot investigate any decision, recommendation, act or omission of a person acting as legal advisor to the crown or acting as counsel to the crown, this would not be investigating that decision.

Mr. Bell: If you cannot investigate you cannot make a recommendation either.

Ms. Morrison: It does not say that.

Mr. Bell: Is it your position that even though you cannot investigate a 15(4)B situation you can make a recommendation in respect of a 15(4)B?

Ms. Morrison: Yes, I think it is. I think if we find an action that a Ministry has taken can only be corrected by recommending that this 15(4)B person do something, I do not see that the Act prevents us from doing that. It does not say nothing in this Act empowers the Ombudsman to investigate or make any recommendations about or to.

Mr. Bell: Can you make a recommendation directly or indirectly that a Cabinet decision be changed?

Ms. Morrison: We can make a recommendation that Cabinet do something like pass orders in council to fix something that some other Ministry has done and we do it all the time.

Mr. Bell: Thank you. Any other reasons why you concluded that 15(4), either A or B, did not apply to this case?

Ms. Morrison: I believe we felt that the decision to proceed with the prosecution was a decision that was taken by Ministry staff, not necessarily by crown counsel.

Mr. MacDonald: And we were not strictly looking at a legal opinion in terms of somebody acting as a legal advisor. That is not what we were focusing on, somebody's legal opinion. We were looking at the decision of Ministry officials, the reasonableness of their actions.

Mr. Bell: That is all the questions I have. Thank you.

Madam Chairman: Any questions from the committee

Yes, Mr. Johnson?

Mr. Johnson: I have one. Maybe it is early to ask because MNR are going to make a presentation, but I might as well ask now anyway.

In my opinion, the Ombudsman's case is based on one word and that is reasonable; and possibly two words, unreasonable. Just for clarification, in the Act it gives the Ministry the option, in my opinion, to lay charges if there is reasonable cause that they are guilty of the offence.

Then we come to the question of whether it is reasonable or not. In the handout at page 3, it says in the course of two telephone conversations with the chief, conversations which in both cases were initiated by the chief for the purpose of obtaining information about the boats fishing quota and also, I assume, from this presentation, that he was informed by the Ministry that the reports had not been filed.

But in your handout, dated January 21st, Additional Facts, Section 4, you state:

"At the end of August and the beginning of September '85 Ministry personnel placed telephone calls requesting the late returns. They are not forthcoming."

My misunderstanding is based on the one Ombudsman's report, I guess, which says the chief initiated the calls and yet in your letter, the Ministry's letter, it states that the Ministry personnel placed the telephone calls. Who placed the telephone calls?

Mr. Robinson: It is our position that the calls were placed by Ministry officials to the chief on both of those occasions.

Mr. Johnson: Your position is that you people did indeed call?

Mr. Robinson: Yes.

Mr. Johnson: And it the Ombudsman's position that the chief made the calls.

Ms. Morrison: In our experience, Mr. Johnson, with ministries, it is usual in Ministry files that if people make phone calls that they make a memo to the file, and we usually, when we are getting information from the Ministry, get the whole Ministry's file.

In this particular case, there was no documentary evidence that showed that the Ministry had made any telephone calls to the person in question and the people at the other end, the Band, the chief, the Band administrator had no recollection that calls has been made to them. So there is no documentary evidence supporting that the Ministry had made those calls.

Mr. Johnson: It goes on in page 31, the Ministry of Natural Resources, the Ministry states in cases of the fishermen who use X, Y, Z, bands:

"The Ministry of Natural Resource personnel made special arrangements to assist them in preparing their reports."

Ms. Morrison: Where are you reading from?

Mr. Johnson: Page 31, the handout. The Ministry of Natural Resources' letter dated January 11th to Dr. Hill.

Ms. Morrison: Right.

Mr. Johnson: Fourth paragraph.

Ms. Morrison: Yes. That is right.

Mr. Johnson: "Different individuals have different needs and in the case of the fishermen from X, Y, Z Band, the Ministry of Natural Resources personnel made special arrangements to assist them in preparing their reports."

Ms. Morrison: Right. They did make this arrangement with them.

Mr. Johnson: That is my problem with reasonable. If they did these things, it would seem to me that they reasonably tried to help them.

Ms. Morrison: We have no doubt that the Ministry was trying to assist this Band in getting its reports in. As you saw, those reports are quite hard to fill out.

The Ministry is trying to help them, and at one point came to an agreement with them that instead of each individual person having to fill those things out, one person would fill them out for everybody. That person did not send them in, but the people he was filling them out for did not know he did not send them in. So when they were charged, they did not know that the reports had not gone in on their behalf.

We are suggesting that the Ministry did not make sufficient effort in trying to let those people know that

their returns had not come in and charged them unreasonably as a consequence.

Mr. Johnson: I think, in my estimation, it would depend on who placed the calls. If the Ministry phoned the Band, I think they did try to resolve. If indeed it was the other way around, then maybe it was unreasonable.

Ms. Morrison: We would certainly have been assisted if the Ministry people had put memos on their files saying we made these calls.

Madam Chairman: Mr. McLean?

Mr. McLean: How do you know they did not?

Ms. Morrison: We do not know that they did not, Mr. McLean. This fact has not been disputed up until this most recent letter.

Mr. McLean: This is the part that I have the problem with. I mean, those people, if they said somebody was going to act on their behalf, it is still their legal responsibility to make sure that that person did act on their behalf; and if they did not, then they are liable to be charged.

Ms. Morrison: They did not know the person was not acting on their behalf. The matter of who made the phone calls, it is our experience that Ministry people are very careful about keeping memos to show that they have done things, especially if later on they are going to make serious decisions as a consequence of whatever happened in that phone conversation.

In this case, if the Ministry's relying on having made those phone calls as a justification for laying the charges, then it would have been a good idea for them to have memos in their files showing that they made them.

Mr. McLean: They did not have any memos?

Ms. Morrison: Not that we have provided with.

Mr. McLean: Does anybody else have any memos?

Ms. Morrison: No. But the chief of the Band does not keep very careful memos of his phone calls, and he was calling about another matter.

Madam Chairman: Mr. Philip?

Mr. Philip: The one recorded meeting face-to-face that I have is on page 5. In April of '85 the Band met with Mr. P. and Mr. F.

I assume that they are the Ministry officials; is that correct?

Ms. Morrison: Sorry, let me catch up with you.
Page 5?

Mr. Philips: Page 5,

Ms. Morrison: Yes, those were Ministry officials.

Mr. Philip: Were there any other recorded face-to-face meetings with the representatives of the fishing corporation between April of '85 and October, six months later, at which time the charges were laid?

Ms. Morrison: We have no information -- sorry. There was a meeting in May apparently. There was a meeting in May when they explained to the Band how to fill in the forms.

Mr. Philip: So it would be then from May until October. So five months would have elapsed between the time in which the forms were explained to members of the fishing corporation until the charges were laid.

Is it fair to say that there was no face-to-face meeting by a representative of the Ministry?

Ms. Morrison: No. The fishery manager in October went to the MNR office in Kenora --

Mr. Philip: That is right. I forgot about that. Okay. So there was one face-to-face meeting?

Ms. Morrison: That is my information. You might want to ask the Ministry more.

Mr. Philip: At the time of the April '85 meeting, as I understand then, would it be safe in reading this to say that the contact person from there on would not be the chief but would be the manager of the corporation?

Ms. Morrison: That is right, what is called the fishery management.

Mr. Philip: Okay, the fishery manager.

Ms. Morrison: Yes.

Mr. Philip: Would the Ministry have been aware that that were charges? I believe I read three times that there were three different fishery managers in between May and October.

Ms. Morrison: I think the Ministry would have been

aware, but you better ask them.

Mr. Philip: Can the Ministry officials answer that?

Mr. Robinson: We have a difficulty here, Mr. Philip, because we have basic disagreements throughout with this facts situation, so it is tough for us to answer at this time without given you our version of the whole arrangement.

Mr. Philip: Let me just direct it to the Ombudsman and then perhaps I can recycle the same questions to you later and we will see where there may be any discrepancy.

Would it be your position that in the light of the changing of managers having gone through the briefing, if you want, in May, if the Ministry was aware of a change of managers that it would have been reasonable to at least meet with the new manager to ensure that that new manager understood what the procedures were?

Ms. Morrison: I think that would have been reasonable.

Mr. Philip: Would it have reasonable not to assume that the chief necessarily would have, with all of his other responsibilities, would have been directly on top of one of his departments, if you can think of it in southern terms?

Ms. Morrison: I think that would be fair.

Mr. Philip: Thank you.

Madam Chairman: Mr. Charlton?

Mr. Charlton: A couple of my questions had been asked. I think I only have one left now.

Regardless of who made the calls and, as you have said, the Ministry has no documentation as they would normally have, did the chief admit that the calls occurred and that he was informed about the forms problem?

Ms. Morrison: The chief recollects that he was talking to MNR officials on a couple of occasions about other things. And at that time, the fact that the returns were -- I think, for June and July, this is in August -- were not, it was mentioned to him, yes.

Mr. Charlton: Okay. So that regardless of who made the calls, he was informed.

Did he inform anybody or recall informing anybody about that fact?

Ms. Morrison: We do not have that information. It was not his responsibility to make the returns.

Mr. Charlton: I understand that.

Madam Chairman: Mr. Johnson?

Mr. Johnson: Again, referring to Paragraph 4 in the Ministry's letter of January 21st pertaining to the telephone call. At the end of August and the beginning of September, Ministry personnel placed telephone calls requesting the late returns. The returns were not forthcoming notwithstanding this request.

At any time, did this Band, the chief or anyone else on behalf of the Band request MNR's assistance, advice, guidance in filling out these returns?

Ms. Morrison: The fishery manager was at the MNR office in October, early October. He was getting assistance from MNR there in filling out the forms. He was filling out the September form doing it wrongly. At that time, he was informed that the June and July forms were not in.

And he intended, as we understand it, to fill them out when he went back to the Band and got the information. But that was early in October and the charges were laid late in October.

Madam Chairman: Mr. McLean?

Mr. McLean: Did your investigator, when he was doing the investigation on this, run into any problems whereby they had problems meeting their commitments before over the period of years, the problem with the Band of not filing their returns properly?

Ms. Morrison: We understand that the Band was charged in the early 70s with fishing over quota, that is the only --

Mr. McLean: But did you observe through the course then on that they were not meeting their fees promptly?

Ms. Morrison: We would not have had that information, although the Ministry could have given it to us. Our contact with the Band was through the Band administrator. And had the Ministry wished to raise the fact these people were continuing to be delinquent, they could have done that.

Just to clarify something about the facts. We have had no dispute about the facts in this case up until the Ministry's document that you have received today. The response to both our 19(3) and our 22(3) letter were broad policy statements about the necessity to protect the fisheries, with which we agree, and the general point that they felt that implementing our recommendation would bring

justice into disrepute.

We have had not any information from the Ministry which would suggest that our facts are wrong.

Mr. McLean: Thank you.

Madam Chairman: Any further questions at this point from the committee?

Mr. Robinson is here, he is counsel for the Ministry of Natural Resources; and with him is Guy Winterton, Regional Biologist, Northwest Region, Ministry of Natural Resources.

I understand, Mr. Robinson, you will start?

Mr. Robinson: Thank you Madam Chairperson.

We have also some other Ministry officials here who are involved with the fisheries program should the committee wish to talk to them when we are finished.

Our argument today is not a strict one or we do not think a complicated one. So for that matter, I would like to have Mr. Winterton speak to you to fill in the context of these agreements. I think that is very important to point out where we disagree with facts and/or conclusions of the Ombudsman.

At the end of that, perhaps, if there is legalistic points to be covered, we could do that subject to Mr. Bell, unless he wanted me to address some of the points that Ms. Morrison raised earlier.

Mr. Bell: We will get to some of them. But however you wish to proceed...

Mr. Robinson: All right. There was a handout that the clerk had that she was going to give to the members of committee, I do not know if you have that yet.

Madam Chairman: Yes, we have it before us.

Mr. Robinson: Mr. Winterton?

Please tell us if you can hear Mr. Winterton all right over this microphone.

Madam Chairman: Speak into the microphone and if we cannot hear you you will be told.

Mr. Winterton: Madam Chairperson, ladies and gentlemen, I want to thank you for the opportunity to be here today at this hearing.

What I would like to do just a few minutes in the

beginning is to establish the importance of the monthly fishing reports. We have all had a look at one and how they fit into our Ministry's conservation strategy, then I would like to go through the sequence of events leading to the charges against the three complainants. I want to outline the effort that we feel the Ministry took to try and assist the members in complying with the legislation and why we felt we had no option but to proceed with our case.

As you are aware, the Ministry of Natural Resources does have the responsibility for managing the resources of the province, fisheries resources in particular, throughout our area in particular. You know where I come from, Northwest Ontario.

In our part of the province, the economy runs around usually three things: One is fish, one is wood and gold when the the price is right. And the fish are extremely valuable to commercial fishermen, to local residents, to the tourist industry and in the local economies of those communities in general.

In managing that resource, we try very hard to make sure that there is a balance of use and a balance between the harvest of the resource and the fish that we need out there as standing stock or capital, if you will, that provide us an annual yeild and a continuing source of fish which does lead to both recreational opportunities and often employment. And if we jeopardize those stocks, I think you can all appreciate the livelihood of all fishermen that are close to the resource; that is, the commercial fishermen and those that draw from the resources in a more secondary way are all affected.

In terms of the commercial fishery, the province instituted a quota system in the early 1980s on all commercial licenses which I am sure if you read the newspapers, I am sure you do, they are occasionally in there on various of the Great Lakes, but we have a large number of lakes licensed all across the province and there are individual quotas on individual species.

At the time that process was put in place, the Ministry of Natural Resources is normally viewed as an outdoor agency but there are times and process and programs that are controlled more by paperwork, I am sorry to say, than actually being out on the water. It is an important part of the job to be on the water, but the method of controlling quotas is essentially a paper trail and that paper trail starts with the report that you saw by the fishermen, which is the initial report of catch. It is important in terms of controlling the fishery, but it is also very important to us in terms of assessing a harvest and in managing a fishery biologically.

The next step, if we have some concerns about the reporting relationship or if we are getting nervous about the quota, is to do cross-checking with fish buyers' returns and so on, who are also required to report to the Ministry.

We feel that the timely reporting or the timely submission on these returns is important, especially if the fishermen has a possibility of going over quota. It is all very well to come along afterwards and deal with those kind of resource situations, but the damage is already done. So as a preventative measure, it is very important for us to get these returns in and fishermen do on occasion call us and we just sort of want to check the system and make sure that they are sitting in tune with their quotas.

As you can appreciate, again, these reports do tie in very closely to our conservation strategy which is proper management of the resource.

One of the principles under which the Ministry manages resources, which I believe has already been mentioned earlier, is that we have always taken the position that the people who benefit from the resource are also responsible for helping to maintain and improve that resource, essentially helping to put back some of what you take. And that is why there is an obligation for commercial fishermen under the regulations to ensure the fish docks, which are valuable to them and everyone else, are conserved.

Of course, there are a lot of ways commercial fishermen are involved in the fishery but one of the ways is submitting the reports and, of course, hopefully in a very accurate and timely fashion. At the very least, we see that as a moral obligation for anyone involved in utilizing the resources but very clearly, as has been pointed out, it is also a legal one.

When we issue a license to a commercial fishermen, we very carefully sit down and spend some time explaining what the obligations are to that licensee. In the case of the returns, it is very clear each fishermen has a legal responsibility to submit the returns, and that is explained very carefully because that is one of the areas where it is important for us that they understand is completely.

It is not our responsibility to go out and obtain that information from the fishermen. It is their responsibility to submit it to us.

A little bit of history. There was a time when we did provide notices and I think human nature would suggest that when you get notices, if it is not that critical, you maybe wait until to the next notice, tax returns or whatever. We found that the process was becoming lengthier and there was some concerns about the amount of administrative time and

cost this was taken.

So in 1982 we sent letters to all commercial fishermen in the northwestern region and we clearly stated three things. One was that reminders would no longer be sent for delinquent returns. We made the point that they were licensed fishermen, they were businessmen, there was a responsible for the return and they were aware of it.

People who did not submit the returns would be subject to prosecution, and we made it very clear that the legal obligation to provide the returns was that of the individual fishermen that was licensed. The complainants in this case had been long time fishermen and were also sent that letter.

It really is virtually impossible for us to send reminders to everyone who is late filing a monthly return. There are approximately 2000 licensed commercial fishermen in the province, some 1000 or so licenses, and we see it as being very time consuming and expensive to send out reminders on a monthly basis to people that are late in filing their return.

In our view, the 1982 letter was a clear indication to the fishermen that they are responsible for meeting their obligations on the monthly report and, for the most part, that worked well. Rather than wait three months to submit their return, their return got submitted at the time when it was supposed to.

However, as hard as that sounds, we do recognize that there are different circumstances in some of these license situation and we have always tried to accommodate those situations in good faith, and Indian Bands are a bit different than some other fishermen.

Many Bands do view the fishery as a community resource and a Band might, for its own purposes, to be very specific about how they allocate that resource in the Band, they might choose to treat it more as something shared by the community.

We have accepted that practice and tried to work within the legal frame work as long as the license and the responsibility for filling the obligations that go along with the license belong to the person whose name appears on the document. We cannot issue a license to a Band because they are not a legal entity. And of course along with that, includes the responsibility for regularly reporting a catch.

Now, this system, in the case of Band B, was not a new process. For many years prior to 1984, the Band fishermen operated under this system with a minimum of difficulty. The reports were generally in in a reasonable time frame. There was a mention of a charge for over quota, which is

true, but generally the reporting process worked well.

We continued to have periodic meetings with the Band during the 1980s; for instance, in 1983 we changed the license structure. Our staff went down to Band B and met at the chief's house with a number of the fishermen and went over the changes in the license structure and again went over and reviewed the licensees' obligation.

In 1984, as part of the modernization of commercial fishery, there was an introduction of a new form. If the fishermen sold to another, other than a licensed buyer, he would have to provide a receipt. So that is what generated a letter in September of 1984 that again the reviewed the forms and the licensees' responsibilities for submissions of returns.

Throughout 1984, we had some considerable difficulty with returns with Band B and in fact there were no returns submitted for 1984, and in fact the Band did go over quota in 1984. And the reason for that was that in 1984 there was a different fishery manager and we were working back and forth with them and then he disappeared with all of the Band's records. So come the end of 1984, our records from (inaudible) would indicate that they were over quota and they had not submitted returns.

At that time, we did exercise our discretion and decide not to proceed with charges. We felt it unreasonable for the Band to provide their returns because they had no records to work from, and that is really what led to the meetings in the spring of 1985.

In April of 1985, staff met with one of the fishermen and the Band administrator and there was an agreement that there should be a general meeting with the chief and the fishermen about the fishery and that was held on May the 9th, 1985.

It seems fairly critical what occurred at that meeting on May the 9th, and our concern at that time, of course, was that we still did not have completion of the 1984 returns, we had an over quota in 1984, and we did not want to see recurrence in 1985.

We indicated to the Band at that meeting -- we went over the problems that had occurred. We had managed to find the missing manager in a town nearby the Band and we sat down with with him, explained all the problems. There was an agreement that no charges would be proceeded with on the over quota, but the over quota would be just deducted from the 1985 licenses. We discussed the difficulty of the returns and there was some time spent trying to sort out what happened in 1984.

But the staff that were present at that meeting, we were still agreeable to having a fishery manager take care of the administration process, but we did make it very clear to them that each licensee and, in spite of the fact they were prepared to accept those forms, each licensee was responsible for ensuring that the forms were sent in on time and they were kept accurately.

We made it very clear that if they did not concur, then the licensees who were named on the licenses would be the responsible persons for that in terms of the reporting sections under the Game and Fish Act.

We did suggest to them that to minimize the number of people it involved, they could have the co-op manager as the licensee on the licenses. We see it in the purview of the chief to decide who are the licensees. That was rejected by the Band. They wanted to leave the licensees the same as they had been in 1984 and not make the co-op manager the person responsible. There is an indication too that the co-op manager was not prepared to take on the legal responsibility by having his name on all the licenses.

So there was that meeting in the spring of 1985 and, as I say, the key objective was to try and clear up 1984 and get on with '85 and take and try to ensure that in 1985 we would not run into the same difficulties.

Ms. Morrison: Excuse me, Madam Chairman.

Madam Chairman: Yes.

Ms. Morrison: I am sorry to interrupt, but there is a lot of information that is coming out in this presentation which we have not received before.

I am prepared for you to hear it, if that is what the committee wants, but I think you should be aware that we did not have this information when we were making our decision and that it was not raised by the Ministry in response to either of our earlier reports.

Madam Chairman: Thank you. We will make note of that, the committee. Also, I think that there will be questioning along the lines of your previous point of the letter that has been put before us today, that was not in the materials, that raised new issues. As always, we will raise that.

If you do not mind them continuing, certainly we are willing to hear you out.

Mr. Winterton: I am sorry. I was just trying to make sure there was a historical perspective here.

However, it is a fact the licensees did not file returns

for June, July or August of 1985 and for those months, the complainants did not fulfill their legal obligations and, of course, this left a gap in our information system and our monitoring of the quotas on this fishery.

When we realized the returns were not being provided, the system was not submitting them, we feel we did try repeatedly to contact the Band and we talked directly to the chief. We have been requested generally in matters of dealing with Bands to deal with the chief, he is sort of the senior person and they have always asked us to do that. So we phoned the chief on a number of occasions and asked for his assistance in obtaining the returns.

That occurred on at least three occasions during the summer and early fall of 1985, that we advised the chief that the required returns had not submitted. We made these efforts despite the previously mentioned written policy which the Band's fishermen were aware of, that we would not issue reminders to send returns in and the responsibility to provide the returns rested with the fishermen. We feel that we worked hard to accommodate the Band over this period and get the fishermen to send their returns in.

I should probably mention that similar efforts with other fishermen worked. They are fifteen other fishermen in this particular district who had also failed to provide the information. They did respond to our efforts and send their returns in. The complainants did not.

By October of 1985, the complainants had still failed to live up to their legal obligations to provide their returns and by the end of October '85 they were charged by our staff under the Game and Fish Act. We felt we just had no option but to do otherwise.

Our requests had gone unheeded. It appeared the laying of charges was the only option left to us, and after an internal review, we agreed to proceed with the laying of charges. These charges, when they went to court, of course the three fishermen pled guilty, one licensee from each of three licenses, convictions were entered for failing to provide the monthly returns and the crown requested minimal penalties. The charges were withdrawn against other fishermen.

The complainants, as you are aware of, have come to Ombudsman who have made two recommendations. The first is essentially that MNR employ a more effective consultative procedure with commercial fishermen for being delinquent in filing returns, and the second is that MNR reimburse the fishermen for their fines and legal expenses.

We do not agree with these recommendations. We do not feel that there is a need for additional consultative

measures with fishermen in general. We do not have a problem with commercial fishermen in general.

There has been a problem with the members of this Band in filing their returns promptly, as you are aware, as required by law. In the past, we worked with the Band and consulted with them. We will continue to do that in an effort to prevent those kinds of problems from recurring. Our objective is to have timely, accurate returns.

To get down to closing here. In fact, the legal process has worked. In 1986, things went well, and again in 1987. The Band administrator is now ensuring returns are completed and in September '87, our staff were again there and helped them devise a computer program to assist in submitting their returns.

The Ombudsman is also recommending that we pay for the fines and legal expenses of fishermen who are convicted of these offences in a court of competent jurisdiction.

We are not prepared to disregard the decision of the trial. We are concerned about the reactions in the local community, the kind of signals that that sends to other fishermen who abide by the the rules; rules that are clearly set out in legislation in which fishermen are aware.

We are concerned about the reaction of other fishermen who have been convicted of the same offence and paid fines, and we are concerned about the signal that sends about the importance of these returns in terms of managing the resource and our conservation efforts. We believe that clearly the action recommended by the Ombudsman is unusual and unwarranted.

The management of Ontario commercial fisheries and all of our fisheries are very important. We feel they must be regulated fairly and justly. If our conservation approach is to be successful, they must be backed up by the fair and consistent administration of justice.

We believe that the recommendations of the Ombudsman will bring the administration of justice in disrepute within the community and within the fishing industry.

In closing, we trust you understand our position and we will be pleased to answer any questions we can.

Madam Chairman: Thank very much.

Mr. Bell?

Mr. Bell: Mr. Winterton, either you or Mr. Robinson, or either or both of you may answer as you are advised.

Can we just put the particular licensees into some context. There are how many commercial fishing licenses in Ontario?

Mr. Winterton: In Ontario, it varies; there are around 900.

Mr. Bell: There are the type of licenses that we are talking about in varying degrees of quota or whatever.

How many native licenses are there of that number?

Mr. Winterton: Across the province, I am not sure. In the particular region we are talking about, probably half or better are native licensees.

Mr. Bell: I am interested in the relative number to the 900.

Mr. Robinson: We do not have that exact information.

Mr. Bell: Well, tell us about your area then.

Mr. Winterton: The more northern fisheries, as you get closer to Hudson and James Bay are virtually all native fisheries.

Mr. Bell: No, but in your area --

Mr. Winterton: I am sorry, what we are talking about, that is my area.

Mr. Bell: How many?

Mr. Winterton: We have about 300 licensees and at least half of them would be Indians.

Mr. Bell: All right. How many prosecutions have been undertaken since 1982 against native licensees in your area?

Mr. Winterton: I do not know the exact number.

Mr. Bell: More than the three we are talking about here?

Mr. Winterton: Yes.

Mr. Bell: More than the six we are talking about here?

Mr. Winterton: Yes.

Mr. Bell: Approximately how many more?

Mr. Winterton: There is probably 15, 20 a year.

Mr. Bell: Per year?

Mr. Winterton: Per year.

Mr. Bell: I am trying to determine for the committee these offences that, in respect of which we understand now they were guilty of these issues, as far as the Ministry is concerned or the evidence that was available, were these deliberate withholding of these reports or were they more acts of omissions, if that is appropriate --

Mr. Winterton: I do not think they were deliberately withheld.

Mr. Bell: We understand, and thank you for the additional information, that they had some problems in '84 that were recognized by the Ministry and no charges were laid.

Mr. Winterton: That is correct.

Mr. Bell: They were charged for three of the middle months in '85. Do we take it that the early 1985 returns had been filed to the Ministry's satisfaction?

Mr. Winterton: The commercial fishing season does not open until May 21st. There is a spring quota that opens May 21st. The licenses were not issued until May 21st, there would be a May return due, and the May return was submitted. There was a mention of the three managers. The first manager, I believe, submitted the May return.

Mr. Bell: All right. Then something happened?

Mr. Winterton: Correct.

Mr. Bell: Did the Ministry conclude or know -- were the reasons for the failure to file the three months in question similar to the reasons that existed in '84 which result in no returns at all?

Mr. Winterton: No. The problems in '84 were mostly that the manager left with their records.

Mr. Bell: Okay. But there is indication in the Ombudsman's reports that the Band had at least two different managers during the material time.

Mr. Winterton: That is correct.

Mr. Bell: It is suggested they had an administrative problem?

Mr. Winterton: That is correct.

Mr. Bell: Dos the Ministry concur that that is probably the reason why these returns were not filed?

Mr. Robinson: The object of our arrangement was to override that, to make sure that someone was in charge.

Mr. Bell: Except that the guy in charge did not live up?

Mr. Winterton: Not necessarily. The chief, having been at the meeting and the arrangement being made with him, we assumed that he, being the top administrator, would be aware of that problem. If there was a problem, he would communicate it to us.

Mr. Bell: But nevertheless, they had some administrative problems?

Mr. Winterton: It would appear that way, yes.

Mr. Bell: I am not sure whether we know. The licensees in question, were they ever warned in writing or otherwise that unless these reports were filed within a specified period of time that charges would be laid?

Mr. Winterton: Not subsequent to the returns not being filed. The last letter of warning --

Mr. Bell: I am not talking about the warning letters, the letters '82, '84.

But you mention in your presentation, and it is also in the material, that there were discussions with the individuals saying: You are late, get it in, or words to that effect.

Mr. Winterton: Not in writing.

Mr. Bell: Did any of those discussions include a warning that if you do not get them in, we have no alternative but to charge you?

Mr. Winterton: I am not aware of that. I do not know.

Mr. Bell: Is there any suggestion made by the individuals or anybody on their behalf, of which the Ministry is aware, that because of the experience in '84, the non-charging, that these people may have been led to believe that charges would not have been laid without some express or deliberate warning by the Ministry?

Mr. Winterton: No, that was all laid out very clearly, as I understand it, at the May 9th meeting. The reasons for not proceeding in 1984 were because we felt they had a reasonable reason for not submitting. The whole object of

the meeting in the spring of '85 was to try and ensure that it did not happen again and that everybody was clear about who was responsible for doing what.

Mr. Bell: Okay. The letter that we were provided with today, the Deputy's letter of January 21st and the Additional Facts that are attached, do you have that with you, before you?

Mr. Robinson: What page is that, Mr. Bell?

Mr. Bell: The second page. The additional synopsis submitted by MNR --

Mr. Robinson: Yes, we have that.

Mr. Bell: -- under Position of the Ministry.

I note your comments dealing with the first Ombudsman's recommendation in a general sense; in other words, you do not have problems with commercial licensees in a general sense so a consultative process is not generally necessary.

Would you agree with me, though, that in terms of the specific complainants you accept the Ombudsman's recommendation?

Mr. Robinson: Not a hundred per cent. We will attempt, I suppose, to have another meeting with the representatives and try again. We do not feel that it is necessary with all commercial fishermen in the area.

Mr. Bell: No. My question is addressed specifically to these complainants, and I am looking at Item No. 1 of this position of the Ministry, Additional.

Mr. Robinson: As I understand it, the problem has solved itself. They now have a computerized system that has taken care of the problem.

Mr. Bell: Whatever may be the situation today, again, the committee needs to know this, and in terms of the specific individuals covered by this specific report, the Ministry concurs with that recommendation?

Mr. Robinson: We are willing to assist them if they need assistance, yes.

Mr. Bell: Does that mean you concur with the recommendation?

Mr. Robinson: Not a specific recommendation because we do not know what is required at this point, Mr. Bell.

Mr. Bell: I do not think the Ombudsman is telling you

what is required. This language is a deliberate language and I can assist you. Where you see things like employer consultative procedure, it is left to you, the Ministry, to determine what that procedure should be?

Mr. Robinson: I do not believe that the Ministry has any problem with that.

Mr. Bell: So we can take it then that as for these specific individuals we concur with recommendation 1?

Mr. Robinson: Correct.

Mr. Bell: The only thing remaining as for the specific individuals is No. 2?

Mr. Robinson: Correct.

Mr. Bell: Can I ask you, if you are able, to set aside for a moment the question of reimbursing for fines and legal expenses, all right? Just put that out of your mind.

Hindsight is a wonderful thing, but given the benefit of hindsight, is it fair to conclude that if you had to do it over again you would have done it a different way before the decision was made to lay the charge?

Mr. Robinson: I think perhaps Mr. Winterton could give you a more first-hand answer on that.

I would just say that this was not a charge that was laid without thought by a disgruntled conservation officer. This goes through a long review process from the fishery conservation officer right up to the Deputy Minister.

So our problem with the recommendation from the Ombudsman is that we felt that we had a viable arrangement that we were sticking to, that we were doing our best to uphold and something went wrong. So in retrospect, we think we followed our terms of the agreement. We wished it had not worked out that way, but we still need that process, the consultative process.

Mr. Bell: Mr. Winterton, you may answer any way you could. But again, if you had to do it over again, do you think a letter in writing, or some other form of appropriate notice to them, that if you do not do it by a date a charge is going to be laid, would have been preferable?

Mr. Winterton: I think the people that are there and the staff that are dealing with these -- they made phone calls as a matter of course, you know, it looks like there is a return not here. We said we are not going to send out letters and, you know, letters and government, just time and so on.

A phone call, when it works, generally brings results. That is perhaps one of the reasons there is not a record of the phone calls. I mean, if anybody had perceived there was going to be a need to come along later and establish a record, the staff probably should have followed that up with a letter, I agree.

I have been there for twelve years and I have dealt with this fishery for twelve years. There is no doubt in mind that the fishermen were aware of their responsibility and that they were aware that the administrative system was not working, because I know the community and I know how many people are in there and I know how it works. We were responding to, over the years, general direction from chiefs that when there are problems in that community that they are responsible for they want to be contacted and we did that.

In retrospect, to get more a specific answer to your question, I would say if we had to do it over again we would do all the same things. We would meet with them talk, we would talk with them, we would have followed up the spring '86 meeting with a letter of confirmation to all of the fishermen and the chief, and the telephone calls to the chief would have followed up by a letter.

Mr. Bell: Specifically with this wonderful hindsight that we all now have, before the charges were laid in October there would have been a letter on file saying: Unless we get them by we have no alternative but to lay charges?

Mr. Winterton: Yes. Knowing the staff involved, my guess is that if that is the text of the telephone call that our staff indicated was made to the chief on September the 9th --

Mr. Bell: I am sorry. I thought you had told us earlier that there was never any warning or indication prior --

Mr. Winterton: I said I did not know. You are asking me for an opinion now and I am saying that in my opinion, knowing that staff, when there is three months return outstanding, they would most likely have made the comment that if we do not get these we are going to have to proceed with --

Mr. Bell: You do not have any actual --

Mr. Winterton: That is a speculation.

Mr. Bell: You have no actual knowledge?

Mr. Winterton: No, I have not.

Mr. Bell: Have you ever put that question squarely to your people?

Mr. Winterton: No, I did not.

Madam Chairman: Mr. Philip?

Mr. Philip: I guess I am confused as to what is new information and what is not. It is fair to say that the synopsis on page 2 -- maybe Ms. Morrison can comment first and then I will hear your response -- that Item 2, Additional Facts, is new information to the Ombudsman?

Ms. Morrison: This is the Ministry's --

Mr. Philip: Yes, January 21st.

Ms. Morrison: Hold on.

Mr. Bell: This is the extra letter.

Ms. Morrison: Item 2?

Mr. Philip: Yes.

Ms. Morrison: We did not have that information before, but this is some seven months earlier than the agreement. Both Item 1 and Item 2 predate the agreement with the fishermen by a number of either years or months.

Mr. Philip: But that is new information introduced to both you and the committee that we did not have before us of today?

Ms. Morrison: I believe that is correct. It might be easier for you to know what is new information and what is not by us suggesting that when we sent the 1983 and the 22(3) report to the Ministry there were no quarrels on the facts contained in those. So anything that is in those is information that we had because they are fairly complete, anything that is not in those is new information to us.

Mr. Philip: Is it fair to say that by introducing Item 2 that the Ministry may be affecting the case inasmuch as the implication of Item 2 seems to be that here is a Band that we have had a series of problems with, we have given them plenty of warnings, and we have given them a chance and we have withdrawn or not pressed charges that we could.

At long last, then you come in as of '85 and we finally had to do something, so we did it. Is that the implication of Item 2 as new information?

Ms. Morrison: Now, are we looking at the same Item 2, Mr. Philip, it is by letter dated September 5th, 1984?

Mr. Philip: Yes.

Ms. Morrison: That letter predates the agreement by seven months.

Mr. Philip: What I am saying is that the information, both contained in the brief by MNR and by Item 2, would imply that instead of this being a problem which resulted after the agreement --

Ms. Morrison: I see what you mean.

Mr. Philip: -- that in fact it was an ongoing problem in that they had given plenty of chances, and that finally then, after the agreement was signed, it was time to not give them any more chances?

Ms. Morrison: Yes, I agree. I did not see what you were driving at with that particular item.

But I was going to point out that because none of the material is contained in our reports suggests that there had been problems with this Band before. That was new information to us that we had just received here and today in this presentation.

Mr. Philip: I guess my concern, Madam Chairperson, is that the procedures of this committee are that new information affecting the judgment of the members should not be introduced at the committee stage level because it is not fair to the -- and this is true, be it the Ombudsman or the particular Ministry because it is not fair to decide that it is not been privy to that information.

I am wondering whether or not that information can be accepted? I mean, it is in our minds now and I do not know how you take it out of your mind, but it does concern me.

Mr. Robinson: Mr. Philip, this particular page that you are referring was given to the Ombudsman a number of days ago. We asked for their comments on it and, as I recall the conversation, it was: We have no objection to this.

Now, true, we did present a rather more enlarged version and those were given also to the Ombudsman yesterday and to counsel for the committee. When this first came to our attention, that it would be over here at the committee, we were advised by the Ombudsman's office that there was not time to prepare an agreed Statement of Fact.

We did, however, review all of our material and by the time we had spoken with the representatives from the field, who came down to respond to and to be here, some new information or perhaps new interpretation was available, and

we felt it only fair to give this version to the committee and counsel to the committee and to the Ombudsman. We did not receive a response to yesterday's delivery of that letter, so we assumed that there was no objection to that procedure.

Mr. Philip: The problem is, and I have said that this before and I have been on the committee for a number of years, is that it really bothers me when what amounts to new information is introduced because it can affect the case and it looks as though -- I am not saying that you are doing this, I am sure your intentions are to help the committee -- but it does mean that somebody gets an extra kick at the can without the other person having an opportunity to investigate or rebuttal.

Madam Chairman: Ms. Morrison?

Ms. Morrison: I just want to suggest that there is an even more important problem with information which comes to us, not just at the committee, but even a few days before the committee.

The Ombudsman makes his decision at various times on the information provided to him. We send a 19(3) letter and say these are our facts. The Ministry writes back and does not disagree with any of the facts but gives us its opinion. The Ombudsman then has no reason to suspect that any of those facts are wrong.

He goes ahead and makes a decision to go to a Section 22 report and again goes back to the Ministry and says: This is my opinion, can you tell me what are going to do it about it. Had they come back at that time, at the end of even the Section 22 report with information which would provide good reasons why they should not implement the recommendation, the Ombudsman might be satisfied within the meaning of the Ombudsman Act that the appropriate action had been taken on the recommendation. We then do not take up your time.

Mr. Philip: It is pretty expensive to operate this committee, and we are not just talking about seventy-five dollars' worth of fines, what we are talking about is process.

I guess it seems to me, and maybe its my public accounts background, that it worries me that if we get a case that might have been settled by the Ombudsman and the particular Ministry and we are trying to have to deal with it at this stage.

I do not know what you wish to do with it, Madam Chairperson, and I am glad you are in the chair and not myself at this present time, but maybe counsel has some

advice on this, but it does bother me.

Mr. Bell: Mr. Philip, this is not the first occasion this has arisen in these particular sessions, and the committee has already indicated that it intends in its next report to comment on it as required and appropriate, and I think that is what should happen. Nobody is imputing any bad motives or intentions.

Again, this is a committee of first. This is, again, the first time the Ministry of Natural Resources has appeared before this committee. This committee has its own process. While we would like to think everybody knows what we do, that is obviously not the case, and perhaps it is timely to remind governmental organizations what the process is all about and what is required before you get to the committee.

Mr. Philip: I am going to perhaps suggest a couple of procedures that we can put in your report that may try and lessen the possibility of this happening again.

My question is on Item 4 then at the bottom of the page in which you state that "to reimburse the licensees the fines which were imposed by the court and which were upheld upon appeal would bring the administration of justice into disrepute with the local community."

Do you agree that the matter before the court was simply whether or not they contravened the law and not whether or not your procedures may have affected them in that contravention?

Mr. Robinson: Technically speaking, I think you are right, Mr. Philip. But I think the perception in the community would be that if you do something wrong and, even in this case, plead guilty, there is a remedy whereby six months later you can go to the Ombudsman and have everything made whole again. I strongly suggest that that would lead to no consistency whatsoever in the administration of justice.

Mr. Philip: Do you not think that if the Ombudsman's committee were to rule for a reimbursement based on the fact that it saw certain procedural inadequacies, but not based on whether or not the persons were guilty of an offence, that the Band members would be sophisticated enough to understand that difference?

In other words, if there were procedural efficiencies then that would be the matter that is before this committee. I mean, these people have been found guilty in a court of law and nobody is questioning that.

Mr. Robinson: Quite true.

Mr. Philip: Furthermore, you stated -- and this is my last question -- you say there are problems now and indeed the Band has gone to a computerized system.

So even if the Band got back an extra 2- or \$300 with an admission that perhaps communications or procedures could have been better between the Band and MNR that that would in any way effect -- since they have gone to a computerized system, since they have a process that seems to be working, that they would in any way jeopardize a system that is now working and is not causing you people to be on their backs for any reason, be it bugging them or laying charges on them? Why would that change?

Mr. Robinson: We certainly do not think that it would cause us a problem financially, but we feel that there is a principle to be established here. And all of those points that you made about whether there was procedural irregularities and so on were within the purview of the Crown Attorney to deal with, either as an abusive process of the courts or when the accused argued the due diligence rule, which is in fact a defense in these sorts of cases. That was totally out of our control at that point, and the fact that the complaint possibly was directed to the wrong Ministry.

The jurisdictional issue was raised by Mr. Bell and I do not want to applaud that one, but I think that is the nub of the issue, that that would have been decided at that level, not at our level.

Mr. Philip: It could have been decided, and you have just admitted that you did not send a warning letter prior to asking the crown to lay the -- you did know that they had three different managers since the 1985 meeting?

Mr. Winterton: I am not sure we knew until this came to light about how many manager there were. We knew we were not getting returns and we knew we called the chief.

Mr. Philip: You knew that the chief was not the contact person as decided by the May 1985 meeting?

Mr. Winterton: But the chief is the contact person for all matters dealing with the Band. The chief is also one of the licensees.

Madam Chairman: Mr. Johnson?

Mr. Johnson: I have problems with two questions: One of reasonable notice and another of ignorance of the law.

In the Ombudsman's report, page 2, it refers to the Band and MNR arrangement. It is satisfactory to all parties that

the fishery manager would be responsible for submitting the monthly report.

In your submission, page 7, you state, I think you just said a few minutes ago, that the Band had requested that important matters be directed to the chief.

So regardless of the agreement and the fishery manager, whether he is there or not, the chief still has some ultimate control to the matter or he should have or I do not think he should be chief.

Mr. Winterton: That is correct. For instance, if the chief came to us and said I want the names changed on this license of these licensees, we would do that in the next year of issuance or take people off. We view the chief as the man that is in charge.

And in terms of the agreement, if you are a commercial fishermen, we are not really concerned whether you submit the returns or your wife submits the returns or whether it is business manager that submits them, we are just concerned that you are the licensee and the law says you owe us a return every month.

With the Band situations, we tend to get a little more involved in those administrative arrangements in terms of trying to help expedite the process, but we would do the same for you if you came to us. But you would still be responsible for submitting the returns; and if they did not come in, we would perhaps phone you as a licensee.

In this case, we phoned the chief, who was a licensee, and they have made very clear to us in all Bands -- it is just like going to a councilman and ignoring the mayor, you do not. You deal with the chief, if you will, the chief executive officer.

Although Bands are not legal entities, we view the chief in the same manner as a chief executive officer of a company or the senior municipal officer in a municipality. We always deal with that person whenever there are any issues.

Mr. Johnson: I would like to carry on then in the Ombudsman's report. I guess the first page, Section 3:

"In August, the chief of the Band called the Ministry to inquire what the Band's fishing catches had been so far for that year to ensure that the quota had not been filled."

Then you refer to the fact that he was advised that there was no report.

Then further in Section 4, on September the 9th, you

advise the chief again called the same Ministry and again inquired about the quota.

The question I have is: Why was the chief inquiring about the quota when he knew that you could not give him information if he had not filed a return?

Mr. Winterton: I can't answer that because it is in our view that he did not call us and inquire about the quota. We called them and advised them that their returns were done.

I was not the person that phoned. I can only say I talked again to the person that phoned when this matter came before us and that was obviously a fact at issue and I specifically asked: Who made the phone calls.

Mr. Johnson: What I am trying to establish is simply the fact the chief, whether he called or you called him, he is in inquiring about quota that he knows cannot be answered because the returns have not been filed.

I submit that he knew that there was a problem. I think that you acted in a reasonable manner.

Madam Chairman: Mr. Elliot?

Mr. Elliot: I would like to begin by asking the question, but I do not want you to answer it immediately because there are some reasons after I ask it why I wanted to ask it in the first place.

The question is: Is it reasonable to expect individual fishermen to recall a catch for a three-month period well after the time, in this case of October, of the fact of the actual fishing?

Now, to begin the supplementary to the question, I would like to compliment you on your attempts from the Ministry point of view at making an arrangement with this particular Band to make sure you had an administrator in place and the reports were going to be filed. I think the Band got caught in that arrangement and, in fact, the individual people.

The way I understand it is that this Band had 12 licenses in the names of 12 people in the Band and the chief was responsible, through an administrator, for the returns to be filed, and that was a commendable kind of arrangement to make, in my opinion.

Now, the duty of this committee, the way I see it, is to protect the individual through the Ombudsman's office, if we can do that, when the bureaucracy or a ministry of the government or whatever gets in the way of them being treated fairly.

The reason I am giving you this background is that in my youth I did do a fisherman's job for a number of summers and the way I recall it, because this must have been prime time for fishing, as I recall it, these three months, is that we would get up before dawn and we would go out and we would fish, drag in the nets, take the fish out of the nets, put them into various containers, put the nets back out and come in, having sorted the fish by species, by weight, roughly, because they sold them some of them differently depending upon the size of the catch.

Now, in this arrangement here where you have a whole lot of people doing it, because I recall that summer different people were on those boats day by day. So, if finally something like this came to light and you went back to the individual fisherman and said: Now, for whatever reason these returns were not filed, we want you to file the three months reports which, over the course of the summer, in my reading of this, all they would have been required to do was to somehow record on a day-by-day basis what sort of catches they had and they may or may not have retained those records depending upon the chief and the administrator to file on their behalf.

Now, in my point of view, the kind of arrangement that was there, while it was a good attempt at satisfying the requirements of the law and everything else, really left the individuals concerned -- the 12 of them boiled down to three or whatever -- in a position where it would be impossible to satisfy the law after the fact.

So my question is: Is it reasonable to expect them to do that in October for the three months in question?

Mr. Winterton: I think it is, because one of the ways the Band has operated for many, many years is that the Band fishermen are supposed to sell all of their fish to the Band run co-op. That is one of the ways that they establish for trying to maintain their records, so that there is a receipt and record system.

Now, that did not always occur. Some of the fishermen sell fish on the side, but fish cannot be sold directly from a fisherman to a consumer in Ontario until they issue a receipt, which is a multi-copied receipt numbered accountable by the Ministry and good government stuff. So they would have a copy of the receipt in their possession, or they should have, for every pound of fish that they sold outside that system to an individual.

If they sell their fish to anyone other than the Ojibway co-op, which is considered to be a registered buyer, I believe, under the Fisheries Act Canada because they have the suitable facilities as a fish buyer and processor, then they would have had to sell to some other buyer and

processor, and there are two or three others in that area.

All those buyers and processors would do two things: One is, they would issue a receipt to the fisherman for the fish that they bought and then; secondly, they would also have records of their own.

And it is not uncommon for fishermen to some times make arrangements with other buyers to make sure they keep all their slips and then send them to the monthly from which they would draw their returns, or is it not uncommon when there are some discrepancies or difficulties to go back to the fish buyer and say: Gee, I lost my records for June and I am discussing it with the Ministry, can you give me a copy of the slips for all of my sales, and they say: Sure.

So it is not unreasonable for them to go back in a reasonable distance in time and make accurate returns.

Mr. Philip: It this is a reasonable distance, in your opinion?

Mr. Winterton: Most companies keep records well back at least a couple of years.

I think if we were looking at a couple of years, you would start to detune that reasonableness. But to look back two, three or four months -- in actual fact, they did eventually manage to get 1984 records all straightened out and submitted. I am not sure when, way on in 1985 sometime. But the records were available.

It is more work, it is more searching and more addition and, in fact, I think to get the 1984 returns done, the officer, Mr. P, spent a considerable amount of time with the third manager in 1985 and they managed, because we had found the Band manager or the co-op manager that disappeared. We had found him in one of the communities and did manage to obtain the records and we could then go back to the Band and sit down with them and get it all sorted out.

Madam Chairman: Thank you very much. Keeping in mind that the time is getting late, and we do not want to upset the judicial process, but we do have to make a decision on this today, Mr. Charlton.

Mr. Charlton: Thank you. I guess the first question I have is in relation to the new information that has been presented today and in the last few days, not as to whether it is relevant or not - and I understand that this is the Ministry' first time here before the Committee; I am not sure whether this is the first time that you have dealt the Ombudsman's office though - but the basic duty of the Ombudsman with any government ministry or any government agency and so on is to determine whether the action of that

Ministry or agency has been fair or reasonable.

Now, in that context, why would you not have informed Ombudsman's office in the process of the background of this issue when they are trying to determine whether what you have done has been reasonable or not. Why were they not informed about what happened in 1984 and what led up to the agreement in May of '85?

Mr. Winterton: As we were aware that we were coming before the Committee, naturally I went back and looked into what the matter was and what the situation was, and to be honest with you, I asked the very same question of the staff, Why was this not brought forth earlier?

And I am sorry I cannot be cross-examined on the answer. I guess I can but I would not have an answer. The staff's answer was the Ombudsman's investigator was not interested in anything but 1985. Now, I know that is not a very pleasant answer, but that was the answer that -- I asked the staff when I said, "My God, why is this all --"

Mr. Charlton: Well, it may be fair that at some point one of the Ombudsman's investigators said, "Look, all we are interested in is this situation." What you have you told us today was that the occurrence in '84 was, in fact, part of this situation.

Mr. Winterton: In our view.

Mr. Charlton: Yes.

Mr. Winterton: Yes, but there are some things that our people would assume incorrectly that someone from the outside would know.

Now, dealing with the chief directly on these kinds of issues is a fact of life up there. It is not a fact of life with which an Ombudsman's staff member would be familiar.

So there is no question that perhaps in some parts of this investigation we fell down. We may not have kept accurate records, we may not have kept enough records or notes or given the right answers to questions, but I think that is behind us now and these are the facts, and we should make a decision based on what is here before us today.

Mr. Charlton: Let us move on from there. You have described to us the situation in 1984. You have described to us what happened in May to come to an agreement to try to resolve that situation. I do not think there is any dispute about the evidence that, in fact, there were two or perhaps three fishing managers during the period May to October, and we have had evidence that a new fishing manager went into the Ministry offices in early October in an attempt to

submit the reports for September.

Now, there were some problems with the way the form was filled out and there was some assistance provided to try and correct the form, but our understanding is that that new fishing manager was informed at that point that the reports for June, July and August were missing and that that new fishing manager had undertaken because he did not have the information to go back and try and make those reports.

Now, the person who made the recommendation in late October to lay the charge, was that person aware that, first of all, there was a new fishing manager, that the fishing manager -- the new fishing manager had been unaware that those reports were missing and that in early October he had undertaken to go back to the Band to try and get the information so that that could be submitted to the Ministry?

Mr. Winterton: The process to lay a charge against an Indian in Ontario is not necessarily a speedy one. I am not sure when that process was initiated, but it was probably initiated before the attendance at the office.

Mr. Charlton: So we may have a situation where two individuals in the Ministry or two sections in the Ministry office were unaware of what was happening in another section?

Mr. Winterton: No, no. Let me complete the statement.

So the process probably started before that based on non-submission of returns for June, July and August, and when the one manager, the third manager, attended the office, there was a difficulty in how the catch was reported, a fairly serious difficulty which relates to quota; i.e. fillets and round fish being reported together.

We offered to help. He said, "No. I have got to go back to the Band and resubmit the returns," as, you are correct, he was advised that the other reports were missing.

Sometime during that period, the approval from the deputy to proceed with charges - and I am surmising here because I do not know when it was started - would have come down, and by the end of October then the staff said, "Well, we still have not seen anything, we still do not have June, July, August, we do not have the revised ones for September. Enough is enough, and we just do not seem to be getting very much of a response --

Mr. Charlton: Was there any contact at that point with the new fishing manager?

Mr. Winterton: When he came into the office; not --

Mr. Charlton: No, no, but he had undertaken to try and fulfill those obligations for the missing months?

Mr. Winterton: Not necessarily. He was told they were missing just as we told the chief they were missing, and he was only dealing with September.

Mr. Charlton: Okay. I will move on. My last question. Again, you have described for us the situation in 1984 where even though from what I can take out of what you have told us here today there was no agreement between the Ministry and the Band around an individual reporting for everybody, that there was an individual who was in control of the Band records who disappeared with those records which left the individual licensees in a bind and that is why you decided not to proceed with charges in the 1984 case.

Mr. Winterton: I wonder if I could just clarify something. There is no written agreement.

Mr. Charlton: No, I understand that. There was no agreement at all though in '84?

Mr. Winterton: Oh, yes, there was.

Mr. Charlton: There was?

Mr. Winterton: There have been agreements for many many years, back into the '80s. In fact, there was one manager who managed the system very well for quite a number of years.

Mr. Charlton: My question was though, In light of what happened in '84 and in light of the vulnerability that that left the individual licensees in, in May of '85 in the specific case we are talking about here and the subsequent events after, why would you come to an agreement with the Band that did not have some process in it to take into account that individuals can screw up?

In other words, why -- if you were trying to resolve the situation that had happened before and trying to avoid its recurrence, why would the agreement not include some procedure between the Ministry and the licensees --

Mr. Winterton: It did though.

Mr. Charlton: No. -- to ensure that when there was an indication of a problem, the licensees would be informed?

In other words, the problem in '84 as you have described it occurred because somebody took off with the records. You have got a case here where you knew you would come to an agreement with the Band that one individual was going to submit the reports even though the legal obligation

ultimately would fall back on the licensees, and you are also telling us that the agreement was come to in an effort to try and assure that there would be no recurrence --

Madam Chairman: Question, please.

Mr. Charlton: -- why would you make an agreement that did not have a process to check back to the licensees at that point?

Mr. Winterton: Okay. We do view that there was an agreement and there was a process. The agreement was that if the administering process does not work, the licencees are liable, and we will be coming back to the licencees. And in terms of contacting the licensees, if there are problems with your administrative process which is administered by the Band, we will contact the senior administrator of the Band, which is the chief, and that is exactly what we did.

The chief perhaps failed to notify the licencees, of which he is one himself. I do not know; that is only speculation.

Madam Chairman: I would like to ask at this point that Ms. Morrison sum up and then again for the Committee to ask any final questions before we decide on this matter.

Ms. Morrison: Thank you very much, Madam Chairman.

I am sorry to go back and harp on a problem which seems to be a general one and not related this case, but it is very, very important I think that this committee consider carefully what this Ministry has said about the Ombudsman's process.

They ignored our 19(3) letter and our 22(3) letter with respect to the facts. All of these facts that you have heard today about contacting the chief, the chief is the person that we should contact, they never suggested to us that we had those facts wrong, and we said in our letter the person that had to be contacted was the manager from the fishery. They never corrected that.

They say now that the process for prosecution was started so early that it would have been started already before the person came into the Kenora office on the September returns. Why in the world did they not then tell the person at that point that the prosecutions were going to be carried out if they did not get these returns in?

There were a number of things that came out in their arguments which they have never raised before. Now, that is not a problem with this committee's process and them not being familiar with your process. That is not the problem.

It is a problem with them not paying any attention to the Ombudsman at all until, as they said, "When we knew were coming to this committee, we went back to get the information that we should have got in the first place."

I am sorry I feel so strongly about that, but I feel if you allow ministries to do that, then we might as well not bring cases before this committee because what will happen is we will have no way of judging what cases to bring and what cases to leave at home.

I think I am not the only one in our party that feels strongly about this, but I do think that it has to be taken into account not just as a process problem with your committee but as a part of your decision on this case. Do you let the Ministry lead us long, not tell us anything until we get to this committee, and then let them give you the information which provides you with an opportunity to make a different decision.

To go back to the real facts of the case, I would like to say that you should keep in mind that they had a discretion about whether to lay charges here. If they had not laid the charges there would have been no need to argue about due diligence, defend the charges and to pay the fines.

What we are talking about here is not a situation in which we are asking the Ministry to disregard the court's decision. We are not asking that at all. We are saying they made errors. They were not fair to these people. They have suggested to you that fairness is expensive. It is expensive to write letters. That is too bad; they will have to make that expenditure.

They were not fair to these people. As a result of not being fair to these people, they laid charges. We are asking them to put the people back in the situation they would have been in if the Ministry had behaved properly in the first place. That is not disregarding the process.

That is saying if the Ministry is going to behave in such a way that it improperly lays charges by not giving people a fair chance to know the charges that are being considered, that they then ought to face the consequences of having to put the thing right in the end.

Thank you.

Madam Chairman: If I may just comment on your first point, Ms. Morrison, I think the Committee has agreed in the last two weeks of deliberations on the importance of all information being provided to the Ombudsman at different stages during the investigation, not after the investigation has been completed. I think all of us concur in saying that

we look dimly on new information coming before the Committee, in particular on the days on which it is sitting to discuss cases.

I think replies should be made at the 19(3) and Section 22(3) stages, and I think the defence that a question has not been put to a Ministry or a Board that is appearing before us is not a good defence in that if it is going to be part of your position, it should be put forward at that stage. We agree with this. I think we all understand this problem.

We thank you for your patience in the last two weeks, not only in this particular case, and I think that we have made it perfectly clear through Mr. Philip that we are going to be looking at this problem very seriously. I think all of us feel this concern is a warranted one and it will be in our deliberations when we do discuss the policy of the Committee. So I would just like to acknowledge that on the latter note, which is the case at hand and the particulars facts.

Mr. Bell has a question.

Mr. Bell: I forgot what I was going to say. No, I have nothing to say.

Madam Chairman: Any other questions from the Committee? We will sit to decide this matter in camera and we will be resuming because we do have a few more matters to discuss after this decision has been made. So we ask that you keep yourselves available.

Thank you very much.

4:12 p.m.

After other business:

4:36 p.m.

Madam Chairman: Thank you very much for waiting. The Committee has come to its decision in the case of Chief B and the Ministry of Natural Resources.

The first decision of the Committee was to support recommendation number 1 of the Ombudsman's Section 22(3) report as follows. It has some amendments.

That the Ministry of Natural Resources employ a consultative procedure in future when dealing with perceived contraventions of Section 8 of Regulation 414 under the Game and Fish Act by directly informing the licencees in this case of delinquent reports in confirming all contact in writing. The Committee has decided not to support

recommendation number 2 outlined in Section 22(3) of the Ombudsman's report, and they will be citing their reasons for that in their report.

The second motion which carried by the Committee was as follows: The Committee expressed grave concern at the Ministry of Natural Resources not responding to the Ombudsman's Section 19(3) report with all the facts that were available to the Ministry at that time. And by so doing, the Ombudsman did not have the full facts in front of him to review this case.

There was no further results of our discussion about this particular case, and we thank you very much for coming before us, both Ministry and Ombudsman, with this particular case, and we hope that all that emanated out of 1984 has been solved and that you will continue to try and facilitate good relations between individual licensees and the Ministry.

We have nothing more to do with this particular case, but we still do have some Ombudsman committee dealings to deal with. So we thank you very much.

The first thing just for the benefit of committee members while we are resitting is that we do not have any further dates for us to sit. We are looking for one more week. We tried to get some time in the near future, and we are unable to come to any agreement with the House Leaders, so we are going to have to really leave it to their discretion for our next week. When we do know when that next week is, we will certainly inform the Ombudsman and all committee members.

Mr. Henderson: Does that mean we are not sitting the week that the Legislature is back?

Madam Chairman: We have applied for February 10th at 10:00 and we are dealing with estimates that day, and that has been approved. Well, we are waiting for the approval of that, but I gather that is --

Mr. Lupusella: Can you send a notice?

Madam Chairman: Yes, we have.

Mr. Henderson: But not the 8th and 9th?

Madam Chairman: Not the 8th and 9th. The only time we are permitted to sit when the Legislature is sitting without too much problems is February 10th.

Yes, Ms. Meslin?

Ms. Meslin: Madam chairperson, I understand you are

meeting on the 10th. My understanding was that it would not be to discuss estimates.

I had checked with the Clerk about a month and a half ago to indicate that I will not be here and had asked that other matters be raised instead.

Madam Chairman: In our letter, I gather that we have put in to discuss estimates or other Ombudsman material, but I must admit I was under the impression that we were discussing estimates on that particular day. Are you not prepared to discuss them on that day?

Dr. Hill: Pardon me, Madam Chairperson, I would certainly like to have my executive director and my controller with me when we discuss the details of the estimates, and if it is possible at all to arrange another time, I would appreciate it.

Madam Chairman: Okay. So I understand that, Ms. Meslin, you cannot be present on February 10th?

Yes, Mr. Philips?

Mr. Philip: I can accept that, but I do want to point out that it is a tradition I think of standing committees to deal with estimates only when the House is in session. So this would mean that the estimates would be held over until sometime in April. Is that your --

Madam Chairman: Yes, it would most probably be, all being well, Wednesday, April the 6th.

Well, for the time being let us assume that we are meeting.

Mr. Morin: Does that mean that the estimates would be approved by the 31st of March even though we have not looked at it before?

Mr. Charlton: We cannot do them in April.

Mr. Philip: What we will have to do - and we have done this before in committees - is probably pass a motion that when we do meet in --

Mr. Morin: I think it should be seen before it is approved.

Mr. Philip: But, if you would just listen to me, it has been done before in which we simply would pass the estimates in the absence of the Ombudsman at the meeting of February and with the understanding that we would have a meeting with the Ombudsman for an equal amount of time to deal with them in retrospect, I guess, and with the issues and the -- It is

unreasonable to have a set of estimates when the Ombudsman's chief executive officers are not there.

Mr. Morin: Why can we not have it in February, the week of the 8th?

Madam Chairman: Pardon me, Mr. Morin?

Mr. Philip: The one time in February that was proposed when the House is sitting is -- You normally deal with estimates - it has been a tradition for various reasons and I do not want to recycle all the reasons - to deal with estimates only when the House is sitting.

Now, the one date in which the House is sitting, the one week before March 31st, is the week in which the Ombudsman's chief administrators, particularly, Mrs. Meslin, are not available. So you have no choice.

Mr. Morin: Then what is the point of discussing estimates if they have already been accepted and then we discuss them later?

Mr. Philip: In every case of estimates under our process they have already been spent anyway. That has been something that has been talked about for years.

Mr. Charlton: You are talking about a month and a half left in the fiscal year.

Mr. Philip: You are talking about a few days. What is the difference?

Mr. Morin: You cannot change it.

Mr. Lupusella: Madam Chairman --

Madam Chairman: Mr. Lupusella?

Mr. Lupusella: -- it is fair even though the Committee has the power to take a decision on the merit of this proposal. I think that it is fair for the benefit of the members to discuss this issue with the House Leaders, if they will agree to carry on with this mandate, but I want the House Leaders to be consulted before a decision is going to take place by this Committee.

Madam Chairman: If it is acceptable, I will undertake to speak with the Clerk and have it presented before the House Leaders on how they suggest that we deal with the estimates, given that we will not have the opportunity to meet while the House is sitting with proper presentation before March 31st, 1988, and that we will put forward the suggestion which Mr. Philip has put forward.

In the event that they have any concern with that, then I will ask them for their alternative suggestion in this matter and whatever that is, we will certainly express it to the Committee. Is that acceptable? I cannot think of how else we can deal with this. It is only speculative from this point.

The final item on our agenda today, and certainly we will be resuming with a lot of other policy, and I am sorry that we did not get into a little bit more of the Ombudsman's report and other details during this two weeks, but I think it was terribly productive.

And we just have the report of the sub-committee on communications from the public, and I would ask that our counsel, Mr. Bell, make that report to the Committee, and if there are any questions afterwards, please, we will wait until after Mr. Bell is finished the report.

Thank you.

Mr. Bell: Thank you, Madam Chairman. Members, just a very brief overview for the benefit of those that are not previously familiar with the purpose and workings of the sub-committee.

Since the inception of this Committee, there have been communications received from members of the public expressing comments and concerns with the organization and/or operation of the office of the Ombudsman. As a plaque on Arthur Maloney's desk used to say when he was Ombudsman, the best way to avoid criticism is to shut up and do nothing. And obviously an organization as significant as the Ombudsman's gets comments and criticisms. We all do.

The Committee decided a number of years ago to assign the responsibility of assessing and considering the comments and concerns expressed to the sub-committee. It did so with the following direction and, really, statement of this Committee's policy that as a general rule, it would not invite members of the public to appear before it in person to address the specific comments or complaints or whatever they have to make.

The Committee, however, would consider the substance of each communication received for the purpose of determining whether there is anything set out therein that would assist the Committee in fulfilling its terms of reference.

Now, what does that mean? Well, your terms of reference are, as you recall, threefold. An important one is to consider whether it is appropriate to enact general rules for the guidance of the Ombudsman in the exercise of its functions, to report to the Legislature on any appropriate matters that arise out of any Ombudsman's report, and it is

in the fulfillment of those terms of reference that that direction was made.

The Committee also decided a number of years ago and has consistently endorsed it since that its function is not to sit here as a court of appeal to reinvestigate and/or overturn decisions made by the Ombudsman, particularly decisions made that do not support the complaint in question.

Having said that, the Committee has also stated that it is prepared in exceptional circumstances where it appears that the Ombudsman has failed to fulfill his responsibilities or perform his functions under the Act that this Committee will act in those circumstances.

Now, that generally is the background against which communications from the public have been received.

Late in 1986, the Committee received communications from two individuals, Mr. A. and a Mr. B, and I will deal with them individually but the timing is important. The Committee did hold a series, its last series of hearings in late 1986, and it was during that period that these communications were received.

One of the Committee's last acts before it disbanded during that period, in view of the matters raised by these two individuals, the Committee instructed me to conduct an investigation into the circumstances of the comments and to report back thereafter to the sub-committee with my findings and, if appropriate, recommendations.

In the interval, of course, the Legislature was probed and there was an election and there was a lot of time that went by. In any event, and independent of those circumstances, I have conducted an investigation into both of the matters for the purpose of determining whether anything raised by the individuals was of a nature that I considered the Committee should as a whole consider it in more detail for the purpose of determining whether its terms of reference or fulfilling its terms of reference and specifically whether there was any need for general rules or any need for any specific recommendations in the particular circumstances.

And that is the background. I reported the results of my investigation to the sub-committee last week and made certain recommendations, and the Committee discussed the matter, asked questions of me. Dr. Hill and Mrs. Meslin were in attendance, as is the practice, and certain questions were asked of them and the Committee has then made the decisions which I now report to you.

In the case of Mr. A, he sought back in November of 1986

to have this Committee conduct an inquiry into the Ombudsman's investigation of his complaints and fundamentally he sought to have this committee, after such an inquiry, substitute its opinions and conclusions for that of the Ombudsman as set out in his report. He fundamentally also sought to have the Committee recommend that his complaints be redressed by the governmental organization in question.

The complaint of the individual had a number of components. I think in substance it was a complaint that a contract of employment was either terminated or not renewed for reasons which were outside of the scope of this person's employment and the performance of the obligations thereunder.

The individual made very serious allegations against the Ombudsman in respect of the investigation of the report. He cited certain failures in the investigative and reporting process and respecting the impartiality of the Ombudsman in the process. It was really as a result of that latter allegation that I was asked to investigate.

There were some specific allegations as to whether all persons who had relevant information were interviewed, whether evidence and issues were appropriately or addressed at all, and also a concern expressed as to perceived, slanderous or defamatory remarks contained in the report about the individual.

My investigation consisted of a review of the documentation relevant to the investigation obtained from the Ombudsman including the report, of course, and including certain documentation relevant to the Ombudsman in finalizing that report.

I interviewed the individual on two occasions. The first occasion in the presence of his legal counsel; the second occasion I interviewed him alone. I also caused an exchange of positions to be effected between the individual and his legal counsel and the Ombudsman, and specifically I said to the individual, "Set out in writing what your specific complaints and concerns are."

They were received. I asked the Ombudsman to specifically respond, and thereafter, I asked the individual to specifically respond to the Ombudsman, and that was done.

As well, I interviewed members of the Ombudsman's staff as well as Dr. Hill and I reported my findings, as I say, last January the 21st.

At the meeting of the sub-committee, I identified certain matters of concern to me respecting the investigative process and the report of the Ombudsman, and I

must emphasize at this point I did not express nor do I nor does the sub-committee express any opinion or conclusion with respect to the opinions and conclusions that the Ombudsman has arrived that. I do not consider that except in exceptional circumstances to be the function of the sub-committee or the Committee or its legal counsel, and it is not done here and in the circumstances it should not be done here.

During the course of the process, if you will, the investigative process, including meeting with the sub-committee, the Ombudsman has come forward and has stated although he believes and his staff believes that the investigation was conducted fairly, thoroughly and in good faith, he wished, with the Committee's consent, the sub-committee's consent and this Committee's approval, to reopen his investigation giving particular attention to the concerns that have been raised and in particular by the sub-committee and by myself.

He further suggested that he report following this further investigation and that that report be provided to both the individual and to this Committee.

The sub-committee decided last week that this is the most appropriate disposition of Mr. A's request. Specifically, the sub-committee decided not to conduct an inquiry concerning individual's complaints and concerns nor to invite him to appear before it to address those concerns publicly.

The sub-committee wishes to remind the Committee that it is not the function of the Committee to reinvestigate complaints or substitute opinions for those of the Ombudsman, again, except in the most exceptional circumstances.

This Committee is not an appeal body, and as I have indicated, it does not invite members of the public to appear before it -- only in very rare circumstances, and only three have occurred to date, and in two of those, general rules were enacted very shortly thereafter by this Committee.

The Committee has the following recommendation to make to this Committee which it urges be endorsed unanimously:

That the Ombudsman reopen his investigation of Mr. A's complaint and, in particular but without limiting the scope of this investigation, he first obtain further evidence concerning relevant issues, interview under oath if necessary additional witnesses including Mr. A's supervisor, and provide Mr. A with an opportunity to make submissions in person on any or all statements about his character contained in the Ombudsman's existing report, and that he

obtained further legal advice from an independent legal counsel on which legal issues surrounding the employment contracts of Mr. A, which contracts were allegedly terminated, and give Mr. A or his legal counsel an opportunity to make submissions on those issues before any final conclusions are made; that the Ombudsman, after the investigation is concluded, report his findings, opinions, conclusions and recommendations, if any, to both Mr. A and the Standing Committee as soon as possible.

The further recommendation is that the Committee await the report of the Ombudsman in this matter before making any final disposition with respect to Mr. A's circumstances.

Having said that, the Committee has asked me to express most strongly the confidence that it has in Dr. Hill and members of his staff to undertake this further investigation with impartiality and the confidence that Dr. Hill and his staff will fulfill the duties and responsibilities in the circumstances in a fair and expeditious manner.

The Committee wishes me further to emphasize again that it has not drawing any conclusions as to the correctness or incorrectness of the Ombudsman's opinions, conclusions or findings contained in this report.

And just a matter perhaps parenthetically, this investigation was extremely long, extremely involved, involving extremely difficult issues of both fact and law. And hindsight is a wonderful thing, as I have said already once today, and I do not think anybody in the Ombudsman's office needs to feel that this is an expression of non-confidence. Dr. Hill is to be commended.

It is a disposition which is appropriate in the circumstances and it is received and recommended in that vein.

That is all I have, Madam Chairman. Members of the Committee may have some questions of me.

Madam Chairman: Is there any questions on this case or can we put the motion?

Mr. Lupusella?

Mr. Lupusella: Just a short question. The investigation was pursued by you through directives coming by the sub-committee or by the Committee?

Mr. Bell: My instructions were received from the Committee as a whole.

Mr. Lupusella: As a whole.

Mr. Bell: Yes.

Mr. Lupusella: When was that? More or less.

Mr. Bell: I believe it was probably November, 1986.

Mr. Lupusella: 1986.

Mr. Bell: Very late, 1986. The Clerk can give you the specific date of the motion. Just a minute; I may be of more assistance.

Well, I am sorry, it may have been February, 1987, when the express or the explicit instruction was given to me by the Committee.

Mr. Lupusella: And, of course, the investigation took place between the Ombudsman's office and the person involved in the case?

Mr. Bell: Well, you are talking about two investigations. My investigation on behalf of the Committee occurred from, to take a date, February, '87, until I reported to the Committee last week, the investigation being interrupted by a number of things, not the least of which was an election and the disbanding of the former committee and certain other matters, the time required by individuals and their legal counsel to prepare and make submissions.

Mr. Lupusella: Now, the Ombudsman is pursuing another investigation on the same case?

Mr. Bell: Well, the Ombudsman has -- and by the way this is not unprecedented for this committee and for the Ombudsman. The Ombudsman has volunteered to reopen his investigation not in a global sense or in a repetitious sense, but to address certain specific matters, and, with respect, it would not be appropriate to discuss publicly those matters because of the confidentiality issue that we have been addressing, which is why the language of the recommendation that I read -- and I can read it again -- is in the general, not the specific.

And because the Ombudsman will be reporting back not only to Mr. A but to the Committee, there is an opportunity to review the re-investigation, if you will, against the motion.

Mr. Lupusella: And the final question is, Mr. A is a person which does not have anything to do with the Ombudsman's office?

Mr. Bell: No, no. This is not a person who was formerly employed. That would put the age-old question, 'Who Ombuds the Ombudsman?'

Mr. Lupusella: Well, you have all the facts.

Mr. Bell: No, no, and that is a very good question. I have yet to answer that question to my own satisfaction.

Mr. Lupusella: Okay. Thank you very much.

Madam Chairman: We have this recommendation of the sub-committee before the Committee. Could we have a motion to accept the recommendation?

Mr. Bossy? Seconded by Mr. Carrothers. Could we have a vote? All those of favour of accepting the recommendation? Thank you very much, unanimously carried.

We have one more report of the sub-communications committee.

Mr. Bell: Dr. Hill, it is not part of the motion, and I know you are concerned to do what has to be done as expeditiously as possible, the committee would hope that your efforts and the following report be provided as expeditiously as possible, recognizing what needs to be done.

Dr. Hill: I provided for that in my correspondence, and I will certainly will do that expeditiously.

Mr. Bell: Thank you.

Madam Chairman, dealing with Mr. B, Mr. B again in late 1986 addressed in writing certain concerns to the Committee again respecting a report of Dr. Hill on the complaint of Mr. B, in which Dr. Hill found in favour of the governmental organization and therefore not in favour of Mr. B.

The specific complaint and concerns of Mr. B were that there were inaccuracies and distortions in the Ombudsman's report, which inaccuracies and distortions caused Dr. Hill to come to a wrong opinion and form wrong conclusions with respect to the matter at hand.

Mr. B sought, in his words, "an appeal to this Committee" in respect of the report and he sought again a public hearing with him participating of the Standing Committee on the matter of the report, the investigation and all that goes with it.

You should know that the complaint of the individual has to do with the termination of his employment and the subsequent decision on his appeal by an administrative tribunal of this province, upholding, if you will, the termination, and in technical terms, the complaint was in respect of the decision of the administrative tribunal.

Mr. B fundamentally disagreed with what he perceived to be a failure on the part of the Ombudsman to recognize and to agree with him that the tribunal's decision should be reversed.

He believed further that the Ombudsman disregard and minimized certain specific evidence which was believed by Mr. B fundamental to the issue decided by the tribunal.

I was again instructed that these instructions were concurrent.

Mr. Lupusella: I am sorry to interrupt you. Which tribunal are you talking about?

Mr. Bell: Well, I would prefer not to disclose the name of the tribunal because of my concern for confidentiality.

Mr. Lupusella: Is this a quasi-judicial tribunal or --

Mr. Bell: It is a quasi-judicial tribunal which is created by an act of this province with specific responsibilities to determine the correctness or the incorrectness of the termination of certain employment contracts.

I was instructed at the same time as I was instructed with Mr. A to conduct an investigation and I did so. The investigation consisted again of causing an exchange between the Ombudsman and Mr. B, Mr. B first specifying his complaints, Dr. Hill responding thereto, and Mr. B thereafter responding to that response. And that was done, received by me, and considered by me.

I again obtained copies of relevant documentation from the Ombudsman's file, including, of course, the report, and I considered same.

I met on one occasion with Mr. B, at which time he again expanded on and further explained the substance of his concern and complaint.

Fundamentally, in this case, Mr. B sought to have the Ombudsman reverse a decision of an administrative tribunal exercising quasi-judicial functions.

I met on January the 21st again with the sub-committee and reported the results of my investigation and made my recommendation. The Committee again discussed it with me in a very full way as well as Dr. Hill and Mrs. Meslin.

The Committee concluded at that time that the circumstances of the concerns and complaints addressed to it by Mr. B do not warrant uninterference by the Standing

Committee in the Ombudsman's process in this case. The sub-committee and so reports to this Committee considers the decisions and the opinions of the Ombudsman as contained in the report dealing with Mr. B to be final.

Again, the sub-committee wishes to reaffirm the position expressed by the Committee on many occasions that it is not an appeal body for the rehearing of complaints brought to the Ombudsman's office by a member of the public, and I might say that implicit in that is that even if this Committee on a review of facts that the Ombudsman has garnered as a result of an investigation may come to a different conclusion, that does not mean that this Committee can or should interfere with the exercise of the Ombudsman's discretion.

What is fundamental is whether the Committee believes the Ombudsman has performed as he is required to perform his functions. That, by the way, is a legal process that is fundamental to our system of justice, of which the Ombudsman forms a part, and Legislative committees do as well.

The sub-committee wishes to remind the Committee that the Committee's role in these circumstances is to review the Ombudsman's process and the exercise of his functions in general and in particular circumstances. If that review demonstrates or should demonstrate substantial errors or if it demonstrates that these functions are not being performed as they should or at all, then the Committee will, in the appropriate circumstances, act.

The Committee, the sub-committee is firmly of the opinion, however, that no such action is appropriate in this case and therefore its recommendation to this Committee that Mr. B's request for an appeal and for an appearance in public be denied.

That was all, Madam Chairman.

Madam Chairman: Any questions on the case of Mr. B and the report of the sub-communications committee?

We have a recommendation before us. Do we have someone to put a motion to put it to a vote? Mr. Philip. Seconded by Mr. Lupusella. Thank you.

All those in favour of accepting the recommendation of the sub-committee please indicate. That is unanimous. None opposed.

Mr. Philip: Madam Chairman, this is the end of the first two weeks of this new Committee, and as someone who has been on the Committee for a number of years, may I just comment that I think this has been the best working, most non-partisan group of people that I have experienced and I

compliment the new members, and no small part of it has been the excellent job that you are doing as the new chairman, and I offer our compliments to the new chairperson.

Madam Chairman: Thank you very much, Mr. Philip. And I on my own behalf can I say how pleasurable the last two weeks have been, and we look forward to our third week sometime in the near future to discuss policy and I expect everyone to think long and hard but what we are going to say and --

Dr. Hill: Madam Chairman, I will be making my comments when the committee reconvenes and I discuss my annual report.

Madam Chairman: Right. Thank you, Dr. Hill.

Adjourned until further notice.

The Committee adjourned at 5:15 p.m.

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